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NO. 80-1305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALFRED L. SNAPP & SON, INC., *et al.*,

Petitioners,

v.

COMMONWEALTH OF PUERTO RICO on the relation of CARLO S. QUIROS, SECRETARY, DEPARTMENT OF LABOR AND HUMAN RESOURCES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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February 2, 1981

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Commonwealth of Puerto Rico has *parens patriae* standing to sue Virginia apple growers who allegedly breached the employment contracts of certain Puerto Rican workers.

2. Whether the Commonwealth of Puerto Rico has *parens patriae* standing based upon alleged harm to its general economy where a small number of Puerto Rican citizens were harmed by the Virginia apple growers' alleged breaches of employment contracts, the impact of the alleged breaches of employment contracts upon the general economy of Puerto Rico was relatively slight, and the affected individual Puerto Ricans were in a position to vindicate their own rights and were actually litigating the same issues in other forums.

PARTIES TO THE PROCEEDING BELOW

The respondent before this Court, the Commonwealth of Puerto Rico on the realtion of Carlos S. Quiros, Secretary, Department of Labor and Human Resources, was the plaintiff before the United States District Court for the Western District of Virginia and the appellant before the United States Court of Appeals for the Fourth Circuit.

The petitioners before this Court, who were defendants before the district court and appellees before the court of appeals, are the following apple growers from the Commonwealth of Virginia:

Alfred L. Snapp & Son, Inc.
Alfred L. Snapp, Sr.
John T. Watt & Son, a corporation, d/b/a Timber Ridge Fruit Farm
John T. Watt, Jr.

Orchard Management Co., Inc.
Harry F. Byrd, III
D.K. Russell and Sons, Inc.
J. Robert Russell
Whitman Orchards
Gordon T. Whitman
Robert Boyd, a corporation, t/a Cloverdale Farm
Robert J. Boyd
The C.L. Robinson Corp.
Delmar Robinson, Jr.
R and T Packing Corporation
C. Robert Solenberger
E. Blackburn Moore
Fred L. and Philip B. Glaize, d/b/a/ Crescent Orchards
Fred L. Glaize, Jr.
Philip B. Glaize
Frederick Farms
James R. Robinson
George B. Whitacre
H.R. & T. B. Byrd
John E. Crumpacker
H.F. Byrd
T.B. Byrd
Harvey Brumback
James Clevenger
McDonald Farms
Messick & Beaver
Frank L. Snapp and Elmer G. Snapp, d/b/a/ H.T. Snapp & Son
Frank L. Snapp
Elmer G. Snapp
R. Roland Snapp
Stewart Bell
Harvey Brumback

Woodside Farm
John W. Smith
William S. Franklin
Wayne McInturff
James B. Swing
George Cather
Garland R. Cather
Irvin R. King
Albert W. Messick
C.H. Jones Orchards
Stanley Bauserman
Robert E. Wyatt

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DECISIONS BELOW

On April 19, 1979, the United States District Court for the Western District of Virginia issued its decision granting the petitioner apple growers' motion to dismiss on the ground that respondent Commonwealth of Puerto Rico lacked *parens patriae* standing. That opinion is reported at 469 F. Supp. 928 (W.D. Va. 1979) and appears at Appendix A hereof.

On October 9, 1980, the United States Court of Appeals for the Fourth Circuit handed down its 2-1 decision reversing the district court. That opinion is reported at 632 F.2d 365 (4th Cir. 1980) and appears at Appendix B hereof. On December 16, 1980, the Fourth Circuit denied the petition for rehearing and suggestion for rehearing in banc filed by petitioners. That order appears at Appendix C hereof.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The Fourth Circuit entered its judgment on October 9, 1980, issued its order denying the petitioners' timely petition for rehearing on December 16, 1980, and denied petitioners' motion for stay of its mandate pending application to this Court for a writ of certiorari on December 29, 1980.

STATUTES INVOLVED

The statutes involved in this case are the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 *et seq.*, and the Wagner-Peyser Act, 29 U.S.C §§ 49-49k. The administrative regulations principally involved are the Temporary Foreign Labor Certification Process Regulations, 20 C.F.R. Part 655 (1978), and the Wagner-Peyser Act Regulations, 20 C.F.R. Parts 653 and 658 (1978). The pertinent provisions of these statutes and regulations are set forth in Appendix D hereof.

STATEMENT OF THE CASE

This action arises out of the events surrounding the 1978 apple harvest in the Commonwealth of Virginia. During the spring of that year, the petitioners, apple growers in the Commonwealth of Virginia, applied to the U.S. Department of Labor for certification of their

needs for temporary foreign labor, anticipating that, as in other years, they would not be able to recruit sufficient domestic labor to harvest their apple corps.[1]

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[1]The Immigration and Nationality Act, specifically 8 U.S.C. §§ 1101(a)(15)(H)(ii) and 1184(c), provides for the admission into the United States of temporary foreign workers when enough qualified unemployed United States workers are not available. The Commissioner of Immigration and Naturalization has delegated to the U.S. Secretary of Labor the responsibility for determining whether enough qualified American workers are available to fill a particular job and whether the admission of temporary foreign workers will adversely affect United States workers. 8 C.F.R. § 214.2(h)(3) (1978). The U.S. Secretary of Labor has promulgated regulations prescribing the standards under which he will determine whether qualified United States workes are available. 20 C.F.R. Part 655 (1978). One requirement of the Temporary Foreign Labor Certification Regulations is that an employer desiring to bring in temporary foreign workers must first submit a job offer which is circulated through the so-called Interstate Clearance System established pursuant to the Wagner-Peyser Act. 20 C.F.R. §§ 655.201(c) and 655.205 (1978).

The Interstate Clearance System is a national system of public employment offices administered through a bureau known as the United States Employment Service. 29 U.S.C. § 49 *et seq.* The purpose of the system is to provide a no-fee labor exchange, whereby employers located in sections of the country where there are too few workers can be brought together with qualified workers from other areas who are seeking employment. 20 C.F.R. § 653.108 (b)(1) (1978). The U.S. Secretary of Labor has promulaged rules and regulations to carry out the provisions of the Act, pursuant to the authority vested in him by the Act. 29 U.S.C. § 49k; 20 C.F.R. Part 653 (1978). Generally, an agricultural employer desiring to utilize the so-called Interstate Clearance System must submit a job order which meets certain specified minimun requirements. 20 C.F.C. § 653.108(c)(7), (d)(3) (1978). The U.S. Secretary of Labor has also established a complaint system to handle employee complaints alleging an employer's failure to comply with Employment Service Regulations. *See* 20 C.F.R. Part 658 (1978).

Over the years, referral of Puerto Rican workes to East Coast apple growers such as the Virginia apple grower petitioners has been complicated by the existence of a law unique among the states participating in the Interstate Clearance System, namely Puerto Rican Public Law 87, 29 L.P.R.A. § 526 *et seq.*, as amended. P.L. 87 requires any mainland employer seeking to hire Puerto Rican workers to first enter into a contract with the Puerto Rican Secretary of Labor and Human Resources. Failure to do so subjects the grower to possible criminal and civil penalties. Because P.L. 87 imposes terms and conditions of employment more onerous and burdensome than those imposed by the Wagner-Peyser Act and the Immigration and Nationality Act, two separate courts have held that Puerto Rican workers could not be considered "available" within the meaning of the Immigration and Nationality Act as long as the special conditions placed on their employment by P.L. 87 remained in effect. *See Flecha* v. *Quiros,* 567 F.2d 1154 (1st Cir. 1977), *cert. denied,* 436 U.S. 945 (1978), and *Galan* v. *Dunlop,* 411 F. Supp. 268 (D.C.D.C. 1975), *appeals dismissed as moot and remanded with order to vacate sub. nom. Galan* v. *Usery,* Nos. 76-1018 and 76-1019 (D.C. Cir. 1977) (unpublished).

As a result of the First Circuit's decision in *Flecha* v. *Quiros, supra,* the U.S. Department of Labor took the position, when the Virginia apple grower petitioners filed their job orders in the spring of 1978, that the job orders would not be circulated to Puerto Rico. After this Court denied certiorari in *Flecha* v. *Quiros* on June 5, 1978, 436 U.S. 945 (1978), the legislature of Puerto Rico approved an amendment to P.L. 87 in July, 1978 by which the Commonwealth Secretary of Labor and Human Resources was authorized to exempt

prospective employers from P.L. 87 under certain conditions. The U.S. Department of Labor subsequently forwarded the Virginia apple growers' job orders to Puerto Rico on August 2, 1978, less than two weeks before the Virginia apple growers were supposed to be "certified" regarding their need for temporary foreign workers. The hasty, last minute recruitment efforts produced names of approximately 1,000 Puerto Rican workers interested in picking apples in the 1978 East Coast apple harvest.[2] The referral of such a large number of Puerto Rican workers to the 1978 East Coast apple harvest was made possible by a unique U.S. Department of Labor program that provided federal funding to finance the transportation expenses of Puerto Rican workers, an advantage provided to no other U.S. workers either that year or in previous years.[3]

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[2]The Virginia apple growers together with other apple growers and apple grower associations filed suit in the United States District Court for the Western District of Virginia challenging the propriety of the exemption from P.L. 87 and of the referral of Puerto Rican workers. The district court granted the requested preliminary injunction. *Frederick County Fruit Growers Association, Inc., et al.* v. *F. Ray Marshall, et al.*, Civ. No. 78-0086(H) (W.D. Va., filed August 31, 1978), *appeals dismissed as moot and remanded*, 594 F.2d 857 (4th Cir. 1978) (unpublished). On June 16, 1980, the district court dismissed the case on the grounds of mootness. (Unpublished opinion.)

[3]The General Accounting Office examined the U.S. Department of Labor's expenditures of Comprehensive Employment and Traning Act ("CETA") funds to transport Puerto Rican workers to the 1978 Virginia apple harvest. *See* Report by the Comptroller General of the United States to Senator Robert C. Byrd, "Recruiting and Placing Puerto Rican Workers with Growers During the 1978 Apple Harvest Were Unsuccessful," HRD 80-45 (GAO, February 14, 1980). The Comptroller General's report states that $275,000 in CETA funds were spent in 1978, although two-thirds of the Puerto

By all accounts, the experience of the Puerto Ricans referred to the 1978 apple harvest in Virginia was not a happy one. In response, the Commonwealth of Puerto Rico filed a complaint in the United States District Court for the Western District of Virginia on January 11, 1979. The Commonwealth sought by this civil action to declare unlawful certain actions of the Virginia apple grower petitioners with respect to 787 Puerto Rican migrant farm workers referred to the defendant Virginia growers for employment as apple pickers during the 1978 apple harvest.[4]

The complaint named 51 defendants, all engaged in the business of growing apples in the Commonwealth of Virginia.[5] Jurisdiction was asserted on the basis of 28 U.S.C. §§ 1331 and 1337.[6] The complaint alleged that a

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Rican workers failed to meet the eligibility requirements for benefits under the Labor Department's regulations. *Id.* at 2, 4. Regarding the recruiting and referral of Puerto Rican workers, the report states that "the effort was poorly managed and resulted in few acceptable workers being referred to growers." *Id.* at 2. The report concludes that "Labor, State and other local employment security agency, and CETA title III grantee staff, as well as the growers we interviewed, attributed this situation to poor recruitment in Puerto Rico." *Id.* Appendix I, at 18.

[4] Only 420 Puerto Ricans actually arrived at the Virginia orchards, and approximately 30 still had employment three weeks later. Second Amended Complaint ¶ 64. The remainder allegedly never left Puerto Rico "because of oral advice from the United States Department of Labor requesting cancellation of remaining flights." *Id.*

[5] Only 31 employers are actually named in the complaint. The other 20 defendants are either officers, partners or employees of the 31 named apple growers.

[6] Petitioners challenged the jurisdiction of the court. Since the district court dismissed the action on the ground that the Commonwealth lacked standing, it found it unnecessary to rule on the other points raised by petitioners' motion to dismiss.

number of Puerto Rican workers, some named and others unnamed, had accepted the Virginia apple growers' job offers that were circulated through the Interstate Clearance System. The complaint further alleged three categories of violations by the Virginia apple growers. First, the complaint alleged that 18 of the Virginia apple growers failed to provide employment to some of their Puerto Rican workers when they applied for employment. Second Amended Complaint ¶ 72. Secondly, the complaint alleged that 27 of the Virginia apple growers had subjected some of their Puerto Rican workers to work conditions more burdensome than conditions established for temporary foreign workers employed by those growers. *Id.* ¶ 74. Thirdly, the complaint alleged that 27 of the Virginia apple growers improperly terminated some of their Puerto Rican workers before expiration of their contracts. *Id.* ¶ 76.

The Commonwealth requested a declaratory judgment that the Virginia apple growers had breached the terms of their contracts with the Puerto Rican workers and had violated various statutes and regulations. Second Amended Complaint, at pp. 30-31. The Commonwealth also requested the district court to permanently enjoin the Virginia apple grower petitioners from future violations of the Wagner-Peyser Act, the Immigration and Nationality Act of 1952, and implementary regulations promulaged by the U.S. Secretary of Labor pursuant to those Acts with respect to Puerto Rican migrant farm workers. Second Amended Complaint, at p. 31.

On February 15, 1978, the Virginia apple growers filed a motion to dismiss the Commonwealth's complaint on five grounds: (1) the Commonwealth lacked standing to prosecute the action, (2) the Commonwealth was not

the real party in interest within the meaning of Rule 17(a) of the Federal Rules of Civil Procedure, (3) the district court lacked jurisdiction over the subject matter of the suit, (4) the Commonwealth failed to join the affected Puerto Rican migrant farm workers who were indispensable parties for just adjudication of the suit, and (5) the Commonwealth's complaint failed to state a cause of action upon which relief could be granted.

After both parties filed briefs in support of their positions and the district court heard oral argument on the motion to dismiss, the district court on April 19, 1979 entered a memorandum opinion and order dismissing the Commonwealth's complaint with prejudice on the ground that the Commonwealth lacked standing as *parens patriae* to prosecute the action. *Commonwealth of Puerto Rico, Etc.* v. *Alfred L. Snapp & Son, Inc.*, 469 F. Supp. 928 (W.D. Va. 1979). The district court concluded that the allegations in the Commonwealth's complaint failed to present a justiciable quasi-sovereign interest since neither the segment of the Commonwealth's population nor the injury to the Puerto Rican economy was of sufficient magnitude to confer *parens patriae* standing and since the Puerto Rican workers allegedly injured stood ready and willing to vindicate their own rights and were in fact actually litigating the same issues in other forums. The Commonwealth appealed the decision to the United States Court of Appeals for the Fourth Circuit.

On October 9, 1980, the Fourth Circuit handed down its decision reversing Judge Turk and holding that the Commonwealth did have *parens patriae* standing to maintain the action. 632 F.2d 365 (4th Cir. 1980) (2-1 decision; Hall, J., dissenting). The majority opinion agreed that the district court applied the correct legal standards but disagreed with the district court's

conclusions that the affected Puerto Rican workers could effectively litigate the same issues themselves and that neither the segment of the population nor the injury to the Puerto Rican economy was of sufficient magnitude to grant *parens patriae* standing. *Id.* at 369, 370. Judge Hall, the dissenting judge, stated that the district court applied the proper legal standards and "properly considered the number of people affected by the Growers' alleged activities, the potential economic impact, and the ability of the workers to litigate their own claims." *Id.* at 370-371.

At the same time the Commonwealth filed its complaint in this case, it also filed a companion suit in the United States District Court for the Southern District of New York against 55 persons engaged in the business of growing apples in the State of New York. *Commonwealth of Puerto Rico on the relation of Carlos S. Quiros* v. *Bramkamp,* Civil No. 79 Civ. 0199 (S.D.N.Y., filed January 12, 1979). The complaint in the New York case was virtually identical to the complaint in this case, the parties filed equivalent briefs, but no hearing was held. Following the lead of Judge Turk of the Western District of Virginia, Judge Kevin T. Duffy filed a memorandum endorsement granting the New York apple growers' motion to dismiss. The memorandum endorsement stated simply that:

> For the reasons stated in the decision of Judge James Turk in the related case of *Commonwealth of Puerto Rico, etc.* v. *Alfred L. Snapp & Son, Inc., et al.,* 469 F. Supp. 928 (W.D. Va. 1979), the within motion to dismiss this action is granted.

The Commonwealth filed a Notice of Appeal with the Southern District on November 1, 1979, and the case is now pending before the Unied States Court of Appeals for the Second Circuit (Docket No. 79-7777).

REASONS FOR GRANTING THE WRIT

A. The Decision of the Fourth Circuit Conflicts with a Decision of the Southern District of New York Which Is Now on Appeal to the Second Circuit.

At the same time that the instant action was filed in the United States District Court for the Western District of Virginia, the Commonwealth of Puerto Rico filed a substantially similar complaint against certain New York apple growers in the United States District Court for the Southern District of New York. *Commonwealth of Puerto Rico, Etc.* v. *Bramkamp,* Civil No. 79 Civ. 0199 (S.D.N.Y., filed January 11, 1979). Apparently convinced by the reasoning of Judge Turk of the Western District of Virginia, Judge Kevin T. Duffy of the Southern District of New York filed a memorandum endorsement granting the New York apple growers' motion to dismiss on the ground that the Commonwealth lacked standing as *parens patriae*. The memorandum endorsement stated simply that:

> For the reasons stated in the decision of Judge James Turk in the related case of *Commonwealth of Puerto Rico, etc.* v. *Alfred L. Snapp & Son, Inc., et al.,* 469 F. Supp. 928 (W.D. Va. 1979), the within motion to dismiss this action is granted.

The Commonwealth's appeal is pending before the United States Court of Appeals for the Second Circuit.[7]

[7]Briefs have been filed with the Second Circuit, and oral argument has been scheduled for February 4, 1981.

As matters now stands, the decision of the United States Court of Appeals for the Fourth Circuit directly conflicts with the decision of the United States District Court for the Southern District of New York. Obviously, if the United States Court of Appeals for the Second Circuit affirms the Southern District of New York, there will be a conflict between circuit courts on the identical issue.

B. The Decision Of the Fourth Circuit Applies a Test for Parens Patriae Standing that Conflicts With Prior Decisions Of This Court.

The Fourth Circuit agreed that the district court applied the correct legal standards. Instead, the Fourth Circuit reversed the district court because it disagreed with the district court's findings that the affected Puerto Rican workers could effectively litigate the same issues themselves and that neither the segment of the population nor the injury to the Puerto Rican economy was of sufficient magnitude to grant *parens patriae* standing. The Fourth Circuit's decision conflicts with prior decisions of this Court in several respects.

First, the Fourth Circuit's conclusion that the Commonwealth of Puerto Rico has *parens patriae* standing allows the Commonwealth to sue the defendant apple growers for alleged breaches of contracts with their Puerto Rican workers.[8] The Fourth Circuit's decision thus permits the Commonwealth to litigate as a volunteer the personal claims of its citizens,

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[8]The Commonwealth has argued that it seeks only declaratory and injunctive relief and not monetary damages, but the issues and the proof problems would be the same in either case since the Commonwealth's claim would involve the identical facts and circumstances as any individual worker's claim.

even though this Court has declared the "settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of citizens." *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 665 (1976). *See also Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387 (1938); *Oklahoma* v. *Atchison, T. & S.F.R. Co.*, 220 U.S. 277 (1911); *Kansas* v. *Colorado*, 204 U.S. 331 (1907).

Secondly, the Fourth Circuit acknowledged that a substantial portion of the population must be affected to justify *parens patriae* standing. 632 F.2d at 369, 370. In sharp contrast to the district court, however, the Fourth Circuit concluded that the "number of farm workers temporarily employed annually does not accurately measure the potential effect of the damaged recruitment efforts on all of Puerto Rico's citizens." *Id.* at 370. The Fourth Circuit focused instead on the "almost unmanageable unemployment problem in Puerto Rico." *Id.* The Fourth Circuit's almost cavalier dismissal of the relatively small number of Puerto Rican workers involved in the 1978 Virginia apple harvest[9] conflicts with a number of this Court's previous decisions involving the *parens patriae* doctrine which emphasized the number of the State's citizens who would be affected. *See, e.g., Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *Missouri* v. *Illinois*, 180 U.S.

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[9]The Fourth Circuit's opinion does not even mention the number of Puerto Rican workers referred to the Virginia apple growers in 1978 or the number who actually arrived at the orchards. Even if one were to consider all 2,318 Puerto Rican workers referred to all East Coast apple growers in 1978 as being affected by the alleged actions of the Virginia apple growers, that number would still comprise less than one-tenth of one percent (0.1%) of the entire Puerto Rican population.

208 (1901); *Georgia* v. *Pennslyvania Railroad Co.*, 324 U.S. 439 (1945); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972). Furthermore, this Court has never looked to conditions in the suing state as justification for *parens patriae standing*. The unemployment problem in Puerto Rico can no more justify *parens patriae* standing in this case than the financial condition of Pennsylvania could have justified *parens patriae* standing in *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976). If the unemployment rate in Puerto Rico is the determinative factor of whether a substantial portion of Puerto Rico's citizens are affected, the Commonwealth could claim *parens patriae* standing whenever a solitary Puerto Rican worker has an employment dispute with a mainland employer in which discrimination is alleged. Such a result would render meaningless the generally acknowledged requirement that a substantial proportion of a state's population be affected for *parens patriae* standing to be found.

Thirdly, the Fourth Circuit concluded that "[i]t cannot be said with any assurance that they [*i.e.*, the individual Puerto Rican workers] are in positions to litigate these issues effectively," 632 F.2d at 370, even though many of those workers have already brought suits against many of the same Virginia apple growers[10] and even though

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[10]All the petitioner apple growers were named as defendants in a purported class action filed in the U.S. District Court for the District of Puerto Rico. *Ceferino Lopez Rivas, et al.* v. *F. Ray Marshall, et al.*, Civil No. 78-2175 (D.C.P.R., filed November 9, 1978). A class action suit was filed on behalf of mainland and Puerto Rican migrant workers against New York apple growers and others seeking damages and injunctive relief. *Juan Valderrama Rios, et al.* v. *Secretary of Labor F. Ray Marshall, et al.*, No. 79 Civ. 5711 (S.D.N.Y.,

the U.S. Department of Labor administers an Employment Service Complaint System to explore employee complaints. The Fourth Circuit's view of the

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filed October 22, 1979). A number of the petitioners have been sued in the Puerto Rican courts as a result of the 1978 apple harvest. *See, e.g., William Ocasio, et al.* v. *Irwing King Drilake Farm, Inc.*, Civil No. CS 78-2443 (Guayama Div.); *Obdulia Caban Badillo, et al.* v. *Fred and Philip Glaize*, Civil No. TS 78-3952 (Aguadilla Div.); *Rafael Diaz Medina* v. *Frederick Farms, Inc.*, Civil No. 78-3273 (Humacao Div.); *Gervasio Vazques Solis* v. *Harvey Brumback*, Civil No. 78-3300 (Humacao Div.); *Juan R. Mariana Ortiz* v. *Henry Brumack*, Civil No. CS 78-2441 (Guayama Div.); *Carlos Flores Reys* v. *C.L. Robinson*, Civil No CS 79-100 (Humacao Div.); *Eladio Saez Vellon, et al.* v. *E. Blackburn Moore*, Civil No. 78-3335 (Humacao Div.); *Bienvenida Soto Vega* v. *Orchard Management Co.*, Civil No. 78-3299 (Humacao Div.); *Santiago Lebron, et al.* v. *Orchard Management Co.*, Civil No. 78-2705 (Guayama Div.); *David Cruz Sosa* v. *Wayne Mc. Onturff*, Civil No. 79-1838 (Aguadilla Div.); *Serafin de Jesus Rivera, et al.* v. *McDonalds Farms*, Civil No. 78-1869 (Utuado Div.); *William Del Valle Fonseca, et al.* v. *Messick and Beaver*, Civil No. CS 79-589 (Caguas Div.); *Miguel Laboy Colon* v. *Ray D. Rinker Estate*, Civil No. 79-1895 (Caguas Div.); *Agustin Morales* v. *Garland R. Cather*, Civil No. TS 78-3951 (Aguadilla Div.); *Ramon L. Charles Rosaly* v. *Irwing King Drilake Farm, Inc.*, Civil No. 79-1711 (Guayama Div.); *Julia Surrilo* v. *Irwing King Drilake Farm, Inc.*, Civil No. 78-2435 (Guayama Div.); *Jesus M. Pinto Rodriguez, et al.* v. *Alfred L. Snapp & Son, Inc.*, Civil No. 79-743 (905) (San Juan District); *Moises Alvarez Gonzalez, et al.* v. *Frederick Farms*, Civil No. TS 79-1839 (Aguadilla Div.); *Catalino Lopez Feliciano* v. *Orchard Management Co.*, Civil No. TS 79-1837 (Aguadilla Div.); *Virginia Arroy* v. *Frederick Farms*, Civil No. 80-245 (Arecibo Div.); *Maguelina Vega* v. *Garland R. Cather*, Civ. No. 80-245 (Arecibo Div.); *Daniel Caban Canan & Jose Rodriguez Olan* v. *John T. Watts & Sons*, Civil No. 80-200 (Mayaguez Div.); *Jose R. Garcia Colon, et al.* v. *Messick & Beaver*, Civ. No. CS 80-577 (Aibonito District); *Jose M. Perez Medina* v. *Garland R. Cather*, Civ. No. 80-188 (Aguadilla Div.); *Cruz Cortes Dominicci* v. *James Clevenger*, Civ. No. 80-1396.

ability of private citizens to fend for themselves not only conflicts with the existing evidence but with this Court's previously expressed position that "[p]rivate citizens are not as powerless . . . as the state suggests." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 265 (1972). Moreover, to allow the Commonwealth to proceed in a *parens patriae* capacity in this action would result in a duplication of litigation involving the same facts and circumstances, with the Commonwealth seeking injunctive relief against a defendant grower in one action and Puerto Rican workers seeking monetary damages and possibly injunctive relief against the same grower in another action, possibly with conflicting results.

C. This Case is One of First Impression for This Court.

While this Court has addressed the doctrine of *parens patriae* standing numerous times, this would be the first case to raise the issue in the context of alleged employment discrimination and contractural violations. Petitioners are aware of no other case which has held that a state has standing as *parens patriae* to rectify alleged employment discrimination against a small number of its citizens in another jurisdiction. The Fourth Circuit's decision, if allowed to stand, would greatly liberalize the test for *parens patriae* standing and open up the federal courts to a whole new class of lawsuit.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that a writ of certiorari issue to review the decision of the court of appeals.

Respectfully submitted,

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February 2, 1981

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

Civil Action No. 79-0007(H)

THE COMMONWEALTH OF PUERTO RICO,
ON THE RELATION OF CARLOS S.
QUIROS, SECRETARY, DEPARTMENT OF
LABOR AND HUMAN RESOURCES,
Plaintiff

v.

ALFRED L. SNAPP & SON, INC.,
ET AL.,
Defendants.

MEMORANDUM OPINION

TURK, Chief Judge.

During the spring and summer of 1978, weather and climatic conditions combined to produce a record apple crop in the orchards along the eastern coast of the United States. This suit concerns the recruitment of workers to harvest that crop.

Stated briefly, a statutory and regulatory scheme has been established by the federal government to insure that domestic workers are given priority over foreign workers for employment opportunities within the United States. *See generally,* Wagner-Peyser Act, 29 U.S.C. §49, *et seq.,* Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq;* 20 C.F.R. Part 655; 8 C.F.R. § 214 (h)(3). As the time for harvest draws near, the apple

growers, as do other crop growers, avail themselves of this system, known as the United States Employment Service, to secure laborers to work the harvest. This service is, in fact, a national system of public employment offices. If workers cannot be found locally, the interstate facilities are utilized to locate available workers in the domestic labor market. For purposes of this service, Puerto Rican workers are considered to be part of the domestic labor force. 29 U.S.C. § 49b(b). If the demand for workers exceeds the domestic labor supply, the employers may petition the Secretary of Labor for a certificate of need for foreign labor, 8 C.F.R. § 214.2(h) (3), 20 C.F.R. Part 655, and, if granted, apply to the Attorney General for non-immigrant visas for persons to perform temporary labor. 8 U.S.C. § 1101(a) (15) (H) (II); 8 U.S.C. § 1184(c).

Commencing in April, 1978, apple growers in New York, Maryland, Virginia, and West Virginia sought to secure seasonal labor for the late summer and early autumn apple harvest through the interstate clearance system. The implementaton of this process, however, was to run a troubled, confused and turbulent course. Ultimately, on the day on which the brief harvest period was to begin, far fewer workers were in the orchards than were needed for the task. This situation posed the very real danger that certain varieties of apples would over-ripen on the trees, thereby greatly diminishing their commercial value. Shortly before the harvest was to begin,the apple growers of the several states filed suit

in this court seeking a mandatory injunction against the United States Secretary of Labor, the Commissioner of the Immigration and Naturalization Service, and their subordinates, to permit the recruitment and employment of foreign workers. The Commonwealth of Puerto Rico was permitted to intervene on behalf of its citizens who allegedly would have been displaced by the employment of foreign workers. To insure that the harvest would be completed, this court entered a preliminary injunction ordering that a certain number of foreign workers be allowed to enter this country to pick the apples. *Frederick County Fruit Growers Association, Inc., et al. v. Marshall, et al., Civ. Action No. 78—0086(H)* (August 31, 1978), *appeal dismissed and remanded,* 594 F.2d 857 (4th Cir. 1979) (unpublished).

During the arguments preceding the entry of the preliminary injunction, it was represented to this court that the apple growers recognized their obligation to give priority in their hiring process to the Puerto Rican workers notwithstanding a court order permitting the employment of foreign workers. The primary thrust of the instant suit is the assertion by the Commonwealth of Puerto Rico, on the relation of Carlos S. Quiros, Secretary of the Department of Labor & Human Resources, that the Virginia apple growers failed to fulfill their acknowledged obligation.

The present action was commenced on January 11, 1979. The named defendants are numerous companies and individuals engaged in the apple industry, all of

whom reside in Virginia. Jurisdiction is predicated upon 28 U.S.C. § 1331, and 28 U.S.C. § 1337. By its second amended complaint, plaintiff alleges that each defendant filed a clearance order with the Virginia Employment Commission, an agency associated with the Federal Employment Service System, containing job orders for a specified number of unskilled agricultural laborers. The Puerto Rico Employment Service, another member fo the interstated clearance system, received job offers from *all* east-coast apple growers totalling 2,318. By August 14, 1978, plaintiff allegedly had recruited 1,094 Puerto Rican workers and thereafter continued its recruitment process until a sufficient number of workers were obtained to satisfy the job orders. Of the 2,318 Puerto Rican workers recruited by plaintiff, only 992 such workers were transported to the mainland, allegedly because of oral advice received from the United States Department of Labor to the effect that the growers had refused to employ those Puerto Rican workers who had arrived previously. The Virginia growers who are defendants here are alleged to have made commitments to employ 787 Puerto Rican workers although only 420 workers arrived in the Virginia orchards as a result of the Labor Department's warning. Within three weeks of their arrival, fewer than 30 remained employed. It is alleged that the remainder were either unable to secure the promised employment or, if employed, were dismissed for lack of productivity or picking damaged fruit. Plaintiffs also allege that the

Puerto Rican workers were subjected to less favorable working conditions than the Jamaicans who had been recruited pursuant to the court order. Such discrimination allegedly benefited the productivity of the Jamaican workers to the detriment of that of the Puerto Ricans. For the alleged failure to employ, unequal treatment, and improper termination, plaintiff seeks a declaration that defendants' actions were in violation of the Wagner-Peyser Act, 29 U.S.C. § 49 *et seq.*, the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.*, as amended, and the regulations promulgated under each, and permanent injunction to enjoin any future violation of the same.

On February 15, 1979, defendants filed a motion to dismiss asserting, *inter alia*, that plaintiff lacked standing to bring this action. After all briefs were submitted, the court heard oral argument on March 7, 1979. After a careful evaluation of the facts alleged in the complaint in light of the evolution of the doctrine of *parens patriae* standing, the court is of the opinion that the motion is well taken and that dismissal of the complaint is required.

The concept of *parens patriae* standing is a rather elusive one which does not lend itself to precise definition. As a preliminary matter, it should be distinquished from those instances where a state seeks to redress an injury sustained in its proprietary capacity, as where a state sues as an injured consumer. *See, e.g. Hawaii v. Standard Oil Co.*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). Before assessing the merits of the instant case, three observations should be made regarding the present posture of this case. First, the Commonwealth brings this suit solely in its capacity as *parens patriae*. No separate proprietary interest in this litigation has been asserted. At best, any such interest

would be predicated necessarily upon the harm to the general economy, the consequential reduction in state revenues, and the increased payment of public benefits. Taken to its logical conclusion, this proposition would permit a state to challenge any business or governmental decision which would adversely affected its economy. The connection between this proprietary concern of the state and alleged wrong is too attenuated to be cognizable for purposes of standing. *Pennsylvania ex rel. Shapp v. Kleppe*, 174 U.S. App.D.C. 441, 445, 533 F.2d 668, 672 (1976). Rather, redress for these wrongs must be sought in the role of *parens patriae*. Second, if *parens patriae* standing is appropriate, the Commonwealth of Puerto Rico is an entity capable of asserting that interest. *Commonwealth of Puerto Rico v. S.S. Zoe Calocotroni*, 456 F.Supp. 1327 (D.P.R.1978); *compare City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032 (2d Cir. 1976); *Board of Supervisors of Fairfax County, Virginia v. United States* 408 F.Supp. 556 (E.D.Va.1976), *appeal dismissed* 551 F.2d 305 (4th Cir. 1977). Finally, plaintiff seeks only declaratory and injunctive relief. Thus, the court is spared the necessity of wrestling with the thorny problems inherent in *parens patriae* damage actions. *See generally, Hawaii v. Standard Oil Co.of California*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972) (anti-trust damages); *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), *cert. denied* 412 U.S. 908, 93 S.Ct. 2291, 36 L.Ed.2d 974 (1973) (class action); *West Virginia v. Chas. Pfizer and Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed. 2d 115 (1971) (class action); *In re Motor Vehicle Air Pollution Control Equipment*, 52 F.R.D. 398 (C.D.Cal.1970), *cert. denied* 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973) (class action); *In re Montgomery*

County Real Estate Litigation, 452 F.Supp. 54 (D.Md.1978); *Note, State Protection of its Economy and Environment: Parens Patria Suits for Damages,* 6 Columbia J.L. & Soc.Prob. 411 (1970).

As in all other cases where the standing of a party to bring suit is in issue, the court is called upon to determine whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Baker* v. *Carr,* 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L.Ed. 2d 663 (1962). No once could challenge the sincerity with which the Commonwealth now seeks to vindicate the interests of its citizens. The essential "concrete adverseness" being assured as a practical matter, the court nevertheless must inquire further to ensure that a state has alleged more than "a mere 'interest in a problem.' " *Sierra Club* v. *Morton,* 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed. 2d 636 (1972). A state cannot, of course, volunteer to litigate a collection of the private claims of its citizens merely because it expresses an interest in doing so. *Pennsylvania v. New Jersey,* 426 U.S. 660, 96 S.Ct. 2333, 49 L.Ed.2d 124 (1976); *New Hampshire v. Louisiana,* 108 U.S. 76, 2 S.Ct. 176, 27 L.Ed. 656 (1883). To satisfy the threshold jurisdictional requirement, a sovereign entity seeking to act in the capacity of *parens patriae* must assert a "quasi-sovereign" interest. *Hawaii v. Standard Oil Co., supra.* Whether such an interest has been stated depends essentially upon the type of interest asserted and the magnitude of the harm involved.

A quasi-sovereign interest has been defined variously as "an interest independent of and behind the

titles of its citizens," *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237, 27 S.Ct. 618, 619, 51 L.Ed. 1038 (1907), and as "an interest apart from that of the individuals affected," *Pennsylvania v. West Virginia*, 262 U.S. 553, 592, 43 SCt. 658, 663, 67 L.Ed. 1117 (1923). Thus, the sovereign interests implicated in the litigation must be sufficiently independent of the interests of the individual citizens to justify state *parens patriae* standing; the injuries to the state and the citizens need not, and usually cannot, be wholly independent. Note, *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages, supra.* Derived from the original power of the King to act as "parent of the country" for the protection of those unable to act for themselves, the traditional concept of a quasi-sovereign interest has been expanded during this century to reach issues involving the health, safety, and welfare of the state's residents. *Hawaii v. Standard Oil Co., supra.* Today, a state may bring suit to protect the public interest so long as that interest is not so vague and remote as to appear ethereal. *Compare Kelley v. Carr*, 442 F.Supp. 346 (W.D. Mich. 1977) *with Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center*, 356 F.Sup. 500 (E.D.Pa. 1973).

The quasi-sovereign interest in the present case arises from the interest of the Commonwealth in the health of its general economy. It is clear that Puerto Rico has been plagued with seriously high levels of unemployment. During September, 1978, 18.5% of the adults in the labor market were unemployed. The problem was even worse in the rural areas where the unemployment figure reached 23%. Plaintiff argues that the challenged activities of defendant served to frustrate its efforts to obtain greater employment opportunities for its

citizens. As a consequence, the expansion of the supply of money in circulation was less than it otherwise would have been, fewer tax revenues were gathered, and additional public benefits were required to be expended. The Commonwealth also asserts an interest in the proper application of federal laws which mandate a preference for Puerto Rican workers over foreign workers. Non-compliance with these laws serves to exacerbate the already serious employment problem present on the island. Thus stated, plaintiff has alleged an interest in the protection and preservation of its general economy, an interest which clearly implicates its quasi-sovereign capacity. *Georgia v. Pennsylvania Railroad Co., et al.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945); *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923).

Once the quasi-sovereign interest has been identified, it must be assessed against the backdrop of the development of the *parens patriae* doctrine.[1] An analysis of the principal decisions which sketch the nebulous perimeter of the theory discloses three crucial factors which influence the decision to grant or deny standing: the size of the segment of the population that has been adversely affected, the magnitude of the harm inflicted, and the practical ability of those injured to obtain complete relief.

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[1]Although many of the decisions which developed the *parens patriae* doctrine dealt primarily with questions of the original jurisdiction of the Supreme Court pursuant to Article III § 2 of the United States Constitution, they do provide precedential value in the case at bar. *Hawaii v. Standard Oil Co., supra.* Similarly, the principles of these cases are applicable notwithstanding the Eleventh Amendment considerations which appear in some of the cases. *Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11, 22-23 n. 26 (3rd Cir. 1975).

Since the propriety of this expanded motion of *parens patriae* standing was recognized in *Louisiana v. Texas*, 176 U.S. 1, 20 S.Ct. 251, 44 L.Ed. 347 (1900), it has been emphasized that the State must be seeking to represent a significant portion of its populace. In *Louisiana v. Texas, supra* and *Oklahoma v. Atchison, Topeka and Santa Fe Railway Co.*, 220 U.S. 277, 31 S.Ct. 434, 55 L.Ed. 465 (1911), the Court noted that original jurisdiction was absent when the suit by the State was for the vindication of the grievances of particular individuals. Consistent with this thesis, *parens patriae* standing has been denied whenever the litigation was intended to benefit the individual interests of a narrow class of citizens, such as a particular industry. *Oklahoma v. Atchison, Topeka and Santa Fe Railway Co., supra* (freight shippers); *Jones ex rel. Louisiana v. Bowles*, 322 U.S. 707, 64 S.Ct 1043, 88 L.Ed. 1551 (1944) (strawberry industry); *accord: Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, 160 F.Supp. 387 (E.D.La.1958) (dried milk manufacturers); *but see Louisiana v. Weinberger*, 404 F. Supp. 894 (E.D.La.1975) (turtle industry). Nor may a state undertake to represent a mere collectivity of purely personal claims. *Pennsylvania v. New Jersey, supra* (tax claims); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 58 S.Ct. 954, 82 L.Ed. 1416 (1938) (creditors and depositors of a state bank); *New Hampshire v. Louisiana*, 108 U.S. 76, 2 S.Ct. 176, 27 L.Ed. 656 (1883) (bond holders). In contrast to these cases are those where a substantial segment of the States citizens has a deep concern with the success of the litigation, e.g. *Missouri v. Illinois*, 180 U.S. 208, 21 S.Ct. 331, 45 L.Ed. 497 (1901); *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923). In *Missouri v. Illinois, supra*, an artificial canal had been constructed to allow the sewerage of the City of Chicago to flow into the Mississippi River. Faced with an alarming

increase in the rate of mortality from typoid fever and other contagious diseases as a result of the pollution of the river, the State of Missouri sought to enjoin the discharge of sewerage. The Court noted that not only would the large communities located on the river be affected, but the economic repercussions would "injuriously affect the entire state." Id. at 241, 21 S.Ct. 331.[2] Some twenty years later, the Court was called upon to decide whether West Virginia, then the largest domestic producer of natural gas, could enact legislation which would severely curtail the flow of natural gas into Ohio and Pennsylvania. *Pennsylvania v. West Virginia, supra.* It was represented to the Court that approximately 1,500,000 citizens of Pennsylvania and 3,625,000 citizens of Ohio were dependent upon the natural gas produced in West Virginia. *Id.* at 590, 43 S.Ct. 658. Finding, that the affected consumers constituted a "significant portion of the State's population," *Id.* at 592, 43 S.Ct. at 663, the Court permitted the action to proceed to judgment. Thus, once the segment of the population adversely affected by the challenged activity approaches proportions which could be considered "significant", the public interest transcends the interest of the individual citizens, thereby allowing the state to seek to vindicate the broader cause.

Consideration must also be given to the magnitude of the harm which is caused or threatened to be caused by the asserted wrong. The proposed termination of natural gas supplies in *Pennsylvania v. West Virginia, supra* would have clearly led to a substantial disruption

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[2]Missouri eventually prevailed in this litigation and the discharge of sewerage into the Mississippi River was enjoined. *Missouri v. Illinois,* 200 U.S. 496, 26 S.Ct. 268, 50 L.Ed. 572 (1906).

of the local economies of Ohio and Pennsylvania. An impact of similar dimensions was alleged in *Georgia v. Pennsylvania Railroad Co., et al.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945) when Georgia complained that the twenty defendant railroad companies had conspired to fix non-competitive rates and charges for the transportation of freight. As a result, Georgia alleged that its economy was in a state of arrested development, its measures to diversify frustrated, and its access to the national market restricted. *Id.* at 444, 65 S.Ct. 716. Georgia was also considered to be the proper party plaintiff when it sought to enjoin the discharge of noxious gas which had caused the wholesale destruction of forests, orchards, and crops in a five county area. *Georgia v. Tennessee Copper Co., 206 U.S.* 230, 27 S.Ct. 618, 51 L.Ed. 1038 (1907). Even where the direct injury falls upon a relatively narrow class of persons, a state may still be allowed to proceed with the action if there are substantial generalized economic effects. *See Hawaii v. Standard Oil Co., supra; Pennsylvania ex rel. Shapp v. Kleppe, supra.* The Court must therefore determine whether the adverse conditions flowing from the challenged conduct are sufficiently severe and widespread as to constitute a wrong against the public interest.

Lastly, the ability of a state to represent its citizens is dependent in part on the presence or absence of other potential or actual plaintiffs who could obtain substantially similar relief. This consideration stems from the observation made by the Court in *Missouri v. Illinois, supra* that individual suits for personal injuries would provide "wholly inadequate and disproportionate remedies" in light of the grave threat to the health of the state posed by the sewerage discharge. *Id.* at 241, 21 S.Ct. 331. Since that time, the

Court has consistently denied *parens patriae* states to state plaintiff's whenever it appeared that the individual citizens were capable of maintaining and prosecuting their own actions for relief. *Pennsylvania v. New Jersey, supra; Hawaii v. Standard Oil Co., supra; see also New Hampshire v. Louisiana,* 108 U.S. 76, 2 S.Ct. 176, 27 L.Ed. 656 (1883). The need for state representation in those instances being obviated, it then becomes apparent that the state plaintiff is attempting to vindicate a collection of private interests rather than its own quasi-sovereign interest.

having contrasted the allegations in the instant complaint against this background, the court is of the opinion that the Commonwealth may not proceed as *parens patriae.* In sheer numbers alone, it is clear that relatively few residents of Puerto Rico were harmed directly by the alleged activities of defendants. At best, only 787 persons out of a total population of 2,712,033[3] were so effected. This segment of the population falls far below the "substantial majority" suggested by some courts. *Pennsylvania ex rel. Shapp v. Kleppe, supra,* 174 U.S.AppD.C. at 448, 533 F.2d at 675. It must also be noted that the jobs which are the subject of this litigation were temporary in nature with a maximum duration of approximately two months. Given these facts, it is apparent that the impact of the alleged wrongs upon the general economy of Puerto Rico was relatively slight and that any harm which might have ensued was neither sufficiently severe nor generalized to permit the Commonwealth to take up the cause.

Plaintiff maintains that the Secretary of the Department of Labor and Human Resources has been charged with a statutory duty to protect the rights of the

[3]1970 census as contained in the *World Almanac and Book of Facts* (1978).

Puerto Rican migrant workers, 3 Pub.L. 87, as amended, and that such authority empowers the Secretary to represent their interests in this action. The Commonwealth informed this court that it intends to use this power vigorously to protect its migrant workers involved in the harvest of other crops as well. While a state could be precluded from commencing an action absent such authority, a statutory enactment cannot, in and of itself, confer Article III standing upon a state plaintiff to sue in the federal courts. *Land O'Lakes Creameries v. Louisiana State Board of Health,* 160 F.Supp. 387 (E.D.La.1958) The premise on which the Commonwealth proceeds is, of course, that the individual victims are unable as a practical or realistic matter to represent their own interests effectively. Despite this pessimism, these "[p]rivate citizens are not as powerless, however, as the State suggests." *Hawaii v. Standard Oil Co., supra,* 405 U.S. at 265, 92 S.Ct. at 893. It has been represented to the court by counsel for both parties that numerous individual law suits, as well as a broad based class action suit, have been filed in the Puerto Rican and federal courts by some of the displaced workers against some of the growers, including several who are defendants herein. Should the plaintiffs in those actions prevail on the merits, no greater relief could be obtained from this court. Since those most directly affected stand ready and willing to vindicate their own rights, the imperative for state intervention is absent. The court can detect no valid purpose to be served by allowing this action to proceed when the fundamental issues are already being litigated elsewhere.

To reiterate, the court finds that the allegations in the complaint fail to present a justiciable quasi-sovereign interest. Neither the segment of the population nor the

injury to the Puerto Rican economy is of sufficient magnitude to permit this court to grant *parens patriae* standing. On balance, the private interests of the victimized classs appear to predominate over the alleged broader public interest and, in fact, are being actively pursued in other judicial forums. This private litigation renders the efforts of the Commonwealth gratuitous and empty. The issue here is not one of sincerity of motive. Rather, it is one of practical judicial administration. When the asserted public interest is, upon closer inspection, relatively narrow in scope, a court must question the propriety of *parens patriae* standing. Given the particular circumstances of this case, the court is constrained to hold that the Commonwealth is not entitled to proceed in that capacity. An appropriate order will this day be entered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1349

The Commonwealth of Puerto Rico
on the Relation of Carlos S. Quiros,
Secretary, Department of Labor and
Human Resources,

Appellants,

v.

Alfred. L. Snapp & Sons, Inc.; Alfred L. Snapp, Sr., Chief Officer; John T. Watt & Son, a corporation d/b/a/ Timber Ridge Fruit Farm; John T. Watt, Jr., Manager; Orchard Management Co., Inc.; Harry F. Byrd, III, President-Treasurer; D.K. Russell & Sons, Inc.; J. Robert Russell, President; Whitman Orchards, a corporation; Gordon T. Whitman, President; Robert Boyd, a corporation t/a CLoverdale Farm; Robert J. Boyd, President-Treasurer; the C.L. Robinson Corporation; Delmar Robinson, Jr., President; R & T Packing Corporation; C. Robert Solenberger, President; E. Blackburn Moore; Fred L. Glaize, Jr. & Philip B. Glaize d/b/a/ Cresent Orchards; Frederick Farms; James R. Robinson, Manager; George B. Whitacre; H.F. Byrd & T.B. Byrd; John E. Crumpacker, Manager; H.F. Byrd; Harvey Brumback; James Clevenger; McDonald Farms; Messick & Beaver; James Beaver; Frank L. Snapp & Elmer G. Snapp d/b/a/ H.T. Snapp & Son; Frank L. Snapp; Elmer G. Snapp; R. Roland Snapp; Robert E. Wyatt; Stanley Bauserman; Stewart Bell; Woodside Farm; John W. Smith; William S. Franklin; Wayne S. McInturff; James B. Swing; George Cather; Garland R.

Cather; Irvin R. King; Albert W. Messick; C.H. Orchards.

Appellees.

Appeal from the United States District Court for the Western District of Virginia at Harrisonburg. James C. Turk, Chief District Judge.

Argued: April 8, 1980 Decided: October 9, 1980

Before BUTZNER, HALL AND SPROUSE, Circuit Judges,

Paul A. Lenzini (Luis Guinot, Charles S. Fax, Lynda R. Troutman on brief) for Appellant; S. Steven Karalekas (Thomas J. Bacas, Charles Karalekas & Bacas; William A. Johnson, Harrison & Johnston on brief) for Appellees.

Paul A. Lenzini (Luis Guinot, Charles S. Fax, Lynda R. Troutman on brief) for Appellant; S. Steven Karalekas (Thomas J. Bacas, Charles, Karalekas & Bacas; William A. Johnson, Harrison & Johnston on brief) for Appellees.

SPROUSE, Circuit Judge:

This is an appeal by the Commonwealth of Puerto Rico[1] from an order of the district court dismissing its complaint against a number of apple growers in the State of Virginia. The district court held that Puerto Rico lacks standing under the doctrine of parens patriae to maintain this action.

[1]On the relation of its Secretary of Labor and Human Resources.

There are fifty-two defendants, all engaged in the business of growing apples in Virginia (the Growers). The complaint alleged that the Growers violated laws of the United States which prefer domestic laborers (citizens of the United States) over foreign temporary laborers. It also alleged that the Growers violated their agreements to hire Puerto Rican farm workers, and discriminated against those who were hired in favor of Jamaican farm workers. The complaint sought a declaration of the rights of Puerto Rican citizens under the Wagner-Peyser Act of 1933, 29 U.S.C. §§ 49—49k as partially implemented by the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.* and the Temporary Foreign Labor Certification Regulations, 20 C.F.R. §§ 655.0 *et seq.* Puerto Rico alleged irreparable injury to its citizens and sought to enjoin the Growers from future violations of these federal laws.

The Growers, assigning a number of grounds, moved for dismissal of the complaint. The trial court granted the motion to dismiss on one ground only-that Puerto Rico failed to present a justiciable quasi-sovereign interest and, therefore, lacked standing under the doctrine of parens patriae. This is the sole issue on appeal.

There was a record apple crop in the orchards along the eastern coast of the United States in 1978. This generated heavy activity to recruit temporary farm workers to pick the apples. The recruiting efforts, however, were not unique to 1978, nor to the eastern coastal area of the country. The phenomenon of recruiting temporary farm workers has produced both benefits and problems for those involved for a considerable number of years.

Congress has created a strong preference favoring domestic workers. It enacted the Wagner-Peyser Act in 1933 to facilitate the flow of labor from supply

states to demand states during that period of depression and high unemployment. This Act, among other things, established the interstate clearance system administered by the United States Department of Labor. Employers transmit their job offers to units of the system—in this case the Puerto Rican Employment Service. To complement the Wagner-Peyser Act, Congress amended the Immigration and Nationality Act, prohibiting the entry of aliens as temporary laborers as long as capable United States workers are available. Only if the demand for workers exceeds the domestic labor supply may employers petition the Secretary of Labor for certificates of need for foreign labor. Puerto Rican workers, of course, are part of the domestic labor force.

I. We must, in considering the correctness of a ruling on a Fed.R.Civ.P. 12(b) motion, accept as true all material allegations of the complaint. *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). So construed, the complaint reflects the following facts. Puerto Rico, in 1978, had a record rate of unemployment conservatively estimated at 23% in the rural areas and 18.5% throughout the Comonwealth. It took a number of steps to alleviate this condition. It made a concerted effort to place Puerto Rican workers with mainland apple growers, including the defendants. The Puerto Rican Employment Service, in response to requests for Puerto Rican workers made through the interstate clearance system in 1978, recruited 2,318 workers. Nine hundred ninety-two of these workers were dispatched to mainland United States. The Puerto Rican Employment Service was then advised, however, to prohibit the remainder from departing Puerto Rico,

because the Growers were refusing to employ Puerto Rican workers when they appeared at their orchards.

Concurrently with this sequence of events, apple growers in several states filed a suit in 1978 in the district court for the Western District of Virginia. *Frederick County Fruit Growers Association, Inc. v Marshall,* Civ. Action No. 78-0086(H) (August 31, 1978), *appeal dismissed and remanded,* 594 F.2d 857 (4th Cir. 1979) (unpublished). That action is not involved in this appeal but is part of the background helpful to understanding the single issue presented here. In that injunction action against the United States Secretary of Labor and the Commissioner of Immigration and Naturalization Service, the apple growers sought to recruit and employ foreign workers. The district court granted a preliminary injunction forcing the issuance of visas for foreign workers in order to ensure the harvesting of an undamaged apple crop. Puerto Rican workers thereafter appearing at the orchard gates were either denied employment or were subsequently terminated from their employment prior to the expiration of their contracts.

II. The prosectuion of parens patriae actions by a state on behalf of its citizens is a practice long embedded in Anglo-American law, *Louisiana v. Texas,* 176 U.S. 1, 20 S.Ct.251, 44 L.Ed. 347 (1900), which has been expanded in this century, *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). In order to assert such standing, however, a state must act pursuant to a "quasi-sovereign" interest. *Hawaii v. Standard Oil Co., supra; Georgia v. Pennsylvania Railroad Co.,* 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051(1945); *Pennsylvania v. West Virginia,* 262 U.S. 553, 43 S. Ct. 658, 67 L.Ed. 1117 (1923); *Georgia v. Tennessee*

Copper Co., 206 U.S. 230, 27 S.Ct. 618, 51 L.Ed. 1038 (1907). There is no specific term of art defining a "quasi-sovereign" interest. In *Georgia v. Tennessee Copper Co.*, 206 U.S. at 237, 27 S.Ct. at 619, the Supreme Court defined it as "an interest independent of and behind the titles of its citizens." In *Pennsylvania v. West Virginia*, 262 U.S. at 592, 43 S.Ct. at 663, it was said to be "an interest apart from that of the individuals affected."

These traditional concepts of quasi-sovereign interests have not changed over the years except to accommodate expanding judicial roles. The modern approach recognizes as appropriate a quasi-sovereign state action involving the health, safety and welfare of its citizens. *Commonwealth of Pennsylvania by Shapp v. Kleppe*, 533 F.2d 668 (D.C.Cir.1976). An interest in the general economy of the state is sufficient to base an action brought by a state in its quasi-sovereign capacity. *Georgia v. Pennsylvania Railroad Co., supra.* As the role of state government has expanded, more diverse "protectable" interests have been recognized. *See, e.g., Kelley v. Carr*, 442 F.Supp. 346 (W.D.Mich.1977); *Commonwealth of Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center*, 356 F.Supp. 500 (E.D.Pa. 1973).

In *Georgia v. Pennsylvania Railroad Co., supra*, the Supreme Court permitted Georgia to sue parens patriae to outlaw discriminatory railroad freight rates. The Supreme Court said:

> [D]iscriminatory rates fastened on a region have a more permanent and insidious quality. Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her

> development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individual who may be affected. Georgia's interest is not remote; it is immediate. If we denied Georgia as *parens patriae* the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction.

324 U.S. at 451, 65 S.Ct. at 723.

The complexities of modern government make it impossible to catalogue the economic interests which can be protected by the sovereign as parens patriae. As the United States Court of Appeals for the District of Columbi Circuit has said:

> The nature of the economic or welfare interest necessary to justify state standing is one of the more obscure issues with which we must deal. The valid though largely unhelpful generality which guides us is that the controversy must in substance implicate the state's interest in economic supervision, and not merely affect the fortunes of a limited class of her citizens.
>
> .... [E]ven where the most direct injury is to a fairly narrow class of persons, there is precedent for finding state standing on the basis of substantial generalized economic effects (footnotes omitted).

Pennsylvania v. Kleppe, 533 F.2d at 674-75.

Three factors normally determine whether the quasi-soverign interest is sufficiently important to permit standing: the size of the segment of the population that has been adversely affected, the

magnitude of the harm inflicted, and the practical ability of those injured to obtain complete relief without intervention by the sovereign. *Pennsylvania v. Kleppe, supra.*

The decisions have generally agreed that a substantial proportion of the population of the sovereign must be affected in order that the sovereign may represent them in a parens patriae capacity. There has been no attempt, however, to reduce this requirement to an exact definition. For example, in *Pennsylvania v. West Virginia, supra,* the economic interest considered involved virtually every citizen of Ohio and Pennsylvania. In other cases, the Supreme Court has indicated that a state is just as legitimately concerned in its quasi-sovereign capacity when a substantial interest of an area smaller than the entire state is affected. *Hawaii v. Standard Oil Co., supra; Georgia v. Tennessee Copper Co., supra; Pennsylvania v. Kleppe, supra.*

While a state in its parens patriae capacity obviously cannot maintain a suit to redress simple injuries to private citizens, *Oklahoma v. Atchison, Topeka & Santa Fe Railroad Co.,* 220 U.S. 277, 31 S.Ct. 434, 55 L.Ed. 465 (1911); *Missouri v. Illinois,* 180 U.S. 208, 21 S.Ct. 331, 45 L.Ed 497 (1901); *Pennsylvania v. Kleppe, supra; Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health,* 160 F. Supp. 387 (E.D.La. 1958), the fact that some of the citizens of the sovereign may be benefited and others not affected by the suit, is not necessarily determinative. Any such suit will benefit some citizens of a state more than others.

The district court in the instant case held that "[n]either the segment of the population nor the injury to the Puerto Rican economy is of sufficient magnitude to permit this court to grant *parens patriae* standing." We disagree.

Puerto Rico as a commonwealth of the United States may, of course, represent its citizens if appropriate quasi-sovereign interests are involved. *Commonwealth of Puerto Rico* v. *S.S. Zoe Colocotroni,* 456 F.Supp. 1327 (D.P.R. 1978).

The Puerto Rico Department of Labor is charged by law to encourage and develop the interest and welfare of the laborers of Puerto Rico, to improve their working conditions and to promote their opportunities to obtain profitable employment. P.R.Laws Ann. tit. 3 §§ 305-06 (1965). It has brought this suit in furtherance of its efforts in this regard. Puerto Rico has an unemployment problem of the gravest dimensions. The United States government, in the midst of a devastating depression in 1933, was faced with the same problems in all of its states and territories, and as one of the many efforts to combat that depression, enacted the Wagner-Peyser Act. The continued utilization of this legislation through the years is not in itself a consideration in determining standing in this case. Puerto Rico's 23% rural unemployment, however, approaches the economic devastation generally rampant in the United States at the time Wagner-Peyser was enacted. This is significant.

Puerto Rico's effort to strengthen its economy and to provide its citizens a way of life comparable to mainland standards must be viewed from a clear perspective. The number of farm workers temporarily employed annually does not accurately measure the potential effect of the damaged recruitment efforts on all of Puerto Rico's citizens. The island's officials are coping with an almost unmanageable unemployment problem. Its economy is in dire straits. The morale of the average Puerto Rican citizen under the circumstances can be expected to be extremely low. Deliberate efforts to stigmatize the labor force as inferior carry a universal sting.

The Puerto Rican government as an integral political subdivision relies on federal laws to help solve the problems of labor supply and demand. The apparent inability of the United States government, through the Department of Labor, to grant Puerto Ricans equal treatment with other citizens or even with foreign temporary workers must certainly have an effect which permeates the entire island of Puerto Rico. Residual injuries to the Commonwealth effort are, to say the least, very serious.

Although a parens patriae representation requires that a substantial portion of the citizens of the sovereign be affected, this requirment is satisfied whether they are affected directly or whether they are indirectly affected. There has never been cast a hard and fast game of numbers.[2] Parens patriae standing is appropriate where a sovereign seeks to protect a vital aspect of the general welfare of a substantial portion of its citizenry from serious, harmful, offensive conduct. It is the magnitude and the pervasiveness of the societal harm that must be weighed-not the directness of the injury to particular individuals.

The Growers contend that suits by individual workers will better achieve the results intended by the instant parens patriae action. We are not persuaded. The complaint alleges irreparable harm to future workers and to citizens in Puerto Rico who do not intend to migrate. Migrant farm workers are so destitute that they must leave their homes for two or three

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[2]Most of the Pennsylvania and Ohio citizens in *Pennsylvania v. West Virginia, supra,* were directly affected in their economic well being. Only some of the citizens of Georgia were directly affected by the noxious fumes in *Georgia v. Tennessee Copper Co., supra.* Most of the Georgia citizenry were only indirectly affected by the improper rate—fixing practices in *Georgia v. Pennsylvania Railroad Co., supra.*

months each year to seek employment. It cannot be said with any assurance that they are in positions to litigate these issues effectively. They would, at best, achieve a piecemeal solution of Puerto Rico's parens patriae grievances and in the process wastefully consume judicial resources.

We, of course, do not pass on the merits of the complaint. There is nothing in the record to indicate the truth or falsity of the allegations. We only hold that Puerto Rico has standing to maintain this action in a parens patriae capacity.

Reversed and remanded for actions consistent with the opinions expressed in this decision.

REVERSED AND REMANDED.

K.K. HALL, Circuit Judge, dissenting:

I do not agree with the result reached by the majority which permits the Commonwealth of Puerto Rico to proceed in this litigation as *parens patriae*. Admittedly, the issue in the context of this appeal presents a very close question. Nevertheless, I am satisfied that the district court acted within the guidelines set forth in *Commonwealth of Pennsylvania by Shapp v. Kleppe*, 533 F.2d 668 (D.C.Cir. 1976), and properly considered the number of people affected by the Growers' alleged activities, the potential economic impact, and the ability of the workers to litigate their own claims. Accordingly, I would affirm the dismissal of the complaint.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 79-1349

The Commonwealth of Puerto Rico
on the Relation of Carlos S. Quiros,
etc.,

Appellant,

versus

Alfred L. Snapp & Sons, Inc., et al,

Appellees.

ORDER

Upon consideration of the appellees' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Sprouse with the concurrence of Judge Butzner. Judge Hall would have granted rehearing.

For the Court,

/s/ William K. Slate, II
CLERK

APPENDIX D
STATUTORY PROVISIONS

Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 (1)(15)(H):

(a) As used in this chapter—

* * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * *

(H) An alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as a trainee; and the alien spouse and minor children of any such alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him.

Immigration and Nationality Act of 1952, 8 U.S.C. § 1184(c):

(c) The question of importing any alien as a non-immigrant under section 1101(a)(15)(H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

REGULATIONS

Temporary Labor Certification Process Regulations, 20 C.F.R. Part 655 (1978):

§ 655.0 Scope and purpose of Part.

(a) *General.* This part sets out the procedures adopted by the Secretary to secure information sufficient to make factual determinations of: (1) whether U.S. workers are available to perform temporary employment in the United States, for which an employer desires to employ nonimmigrant foreign workers, and (2) whether the employment of aliens for such temporary work will adversely affect the wages or working conditions of similarly employed U.S. workers. These factual determinations (or a determination that there are not sufficient facts to make one or both of these determinations) are required by the Attorney General, acting through the Immigration and Naturalization Service (INS) of the Department of Justice, to assist the Attorney General to carry out the policy of the

Immigration and Nationality Act (INA), as implemented in the INS regulation at 8 CFR 214.2(h)(3)(i), that a nonimmigrant alien worker not be admitted to fill a particular temporary job opportunity unless no qualified U.S. worker is available to fill the job opportunity, and unless the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.

(b) *The statutory standard.* The Immigration and Nationality Act (the Act) (8 U.S.C. 1101 et seq.) regulates the admission of immigrant and non-immigrant aliens into the United States. Section 1101 (a)(15)(H)(ii), 8 U.S.C., defines "nonimmigrant aliens" as folows:

(a) As used in this chapter

* * * * *

(5) The term "immigrant" means an alien except an alien who is within one of the following classes of nonimmigrant aleins—

(H) An alien having residence in a foreign country which he has no intention of abandoning.

* * * * *

(ii) Who is coming temporarily to the United States to perform temporary services of labor, if unemployed persons capable of performing such service or labor cannot be found in this country.

The basis for the admission of nonimmigrant aliens into the United States is set by section 1184(a), 8 U.S.C. which provides in pertinent part:

(a) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may be regulations prescribe***

Section 1184(c), 8 U.S.C., directs the Attorney General to consult with "appropriate agencies of the Government" prior to a determination on the petition of an employer for the importation of temporary nonimmigrant alien workers:

(c) The question of importing any alien as a nonimmigrant under section 1101(a)(15)(H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

(c) *The INS regulations.* The Attorney General, through the Immigration and Naturalization Service (INS), has promulgated regulations to implement the Attorney General's responsibilities regarding the admission of temporary foreign workers. These regulations, which are codified at 8 CFR 214.2(h)(3), adopt the same admission standards for nonimmigrant temporary foreign workers that the INA (8 U.S.C. 1182(a)(14) (A) and (B)) requires for certain immigrants who seek to perform permanent work in the United States. They also provide employers the right to an adjudicatory review before the INS whenever the Secretary has advised the INS that one or both of the factual determinations cannot be made, 8 CFR 214.2(h)(3)(i) requires:

[A] certification from the Secretary of Laborstating that qualified persons in the United States are not available (see 8 U.S.C. 1182(a)(14)(A)) and that the employment of the beneficiary will not adversely affect

the wages and working conditions of workers in the United States similarly employed (see 8 U.S.C. 1182(a)(14)(B)) or a notice that such a certification cannot be made, shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 10(a)(a)(15)(H)(ii) of the Act. If there is attached to the petition a notice from the Secretary of Labor that certification cannot be made, the petitioner shall be permitted to present countervailing evidence that qualified persons in the United States are not available and that the employment policies of the Department of Labor have been observed. All such evidence submitted will be considered in the adjudication of the petition.

Under the authority of the INA and the INS regulations the Secretary of Labor has promulgated the reulations in this part. They set forth the requirements and procedures applicable to requests for certification by employers seeking the services of temporary foreign workers. They provide the Secretary's methodology for the two-fold determination of availability of domestic workers for, and of any adverse effect which would be occasioned by, the use of foreign workers for particular temporary jobs in the United States.

(d) *The Secretary's determinations.* Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms. benefits, and conditions for the particular job opportunities, below which similarly employed U.S. workers would be adversely affected, must be established. (The regulations in this part establish such minimum levels for wages, terms, benefits, and conditions of employment.) Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the establishe dminimum levels. If it is

concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc. v. Usery,* 531 F.2d 299 (5th Cir. 1976.)

Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in this part set forth requirements for recruiting U.S. workers in accordance with this principle.

(e) *Construction.* This part and its subparts shall be construed to effectuate the purpose of the INA that U.S. workers rather then aliens be employed wherever possible. *Elton Orchards, Inc. v. Brennan,* 508 F. 2d 493, 500 (1st Cir. 1974), *Flecha v. Quiros,* 567 F.2d 1154 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the terms and conditions of domestic workers similarly employed, *Williams v. Usery,* 531 F. 2d 305 (5th Cir. 1976); *Florida Sugar Cane League, Inc.* v. *Usery,* 531 F.2d 299(5th Cir.1976), and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers.

§ 655.00 Authority of the Regional Administrator.

Pursuant to the regulations under this part, temporary labor certification determinations are ordinarily made by the Regional Administrator of an Employment and Training Administration region. The Administrator, however, may direct that certain types of applications or

certain applications shall be handled by, and the determinations made by, the United States Employment Service (USES) in Washington, D.C. In those cases the Regional Administrator will informally advise the employer or agent of the name of the official who will make determinations with respect to the application.

Subpart C—Labor Certification Process for Temporary Agricultural and Logging Employment

§ 655.200 General Description of this subpart and definition of terms.

(a) An employer who desires to use foreign workers for temporary employment must file a temporary labor certification application including a job offer for U.S. workers with a local office of a State employment service agency. The employer should file an application a minimum of 80 days before the estimated date of need for the workers. If filed 80 days before need, sufficient time is allowed for the 60-day recruitment period required by the regulations and a detrmination by the Regional Administrator (RA) as to the availability of U.S. workers 20 days before the date of need. Shortly after the application has been filed, the RA makes a determination as to whether or not the application has been filed in enough time to recruit U.S. workers and whether or not the job offer for U.S. workers offers wages and working conditions which will not adversely affect the wages and working conditions of similarly employed U.S. workers, as prescribed in the regulations in this subpart. If the application does not meet the regulatory wage and working condition standards, the RA shall deny the temporary labor certification application and offer the employer an administrative judicial review of the denial by a Department of Labor Hearing Officer. If the

application is not timely, the RA has discretion, as set forth in these regulations, to either deny the application or permit the process to proceed reasonably with the employer recruiting U.S. workers upon such terms as will accomplish the purposes of the INA and the INS regulations. Where the application is timely and meets the regulatory standards, the State employment service agency, the employer, and the Department of Labor recruit U.S. workers for 60 days. At the end of the 60 days, the RA grants the temporary labor certification if the RA finds that (1) the employer has not offered foreign workers higher wages or better working conditions (or less restrictions) than that offered to U.S. workers, and (2) U.S. workers are not available for the employer's job opportunities. If the temporary labor certification is denied, the employer may seek an administrative-judicial review of the denial by a Department of Labor Hearing Officer as provided in these regulations. The Department of Labor thereafter advises the Immigration and Naturalization Service (INS) of aprovals and denials of temporary labor certifications. The INS may accept or reject this advice. 8 CFR 214.2(h)(3). The INS makes the final decision as to whether or not to grant visas to the foreign workers. 8 U.S.C. 1184(a).

(b) *Definitions for terms used in this subpart.* "Administrator" menas the chief official of the United States Employment Service or the Administrator's designee

"Adverse effect rate" means the wage rate which the Administrator has determined must be offered and paid to foreign and U.S. workers for a particular occupation and/or area so that the wages of similarly employed U.S. workers will not be adversely affected. The Administrator may determine that the prevailing wage rate in the area and/or occupation is the adverse effect rate, if the use (or non-use) of aliens has not depressed the wages of similarly

employed U.S. workers. The Administrator may determine that a wage rate higher than the prevailing wage rate is the adverse effect rate if the Administrator determines that the use of aliens has depressed the wages of similarly employed U.S. workers.

"Agent" means a legal person, such as an association of employers, which (1) is authorized to act as an agent of the employer for temporary labor certification purposes, and (2) which is not itself an employer, or a joint employer, as defined in this section.

"Area of intended employment" means the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Standard Metropolitan Statistical Area (SMSA), any place within the SMSA is deemed to be within normal commuting distance of the place of intended employment.

"Employer" means a person, firm, corporation or other association or organization (1) which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a worker at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it hires, pays, fires, supervises and otherwise controls the work of such employees. An association of employers shall be considered an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with the employer member if it shares with the employer member one or more of the definitional indicia.

"Employment and Training Administration (ETA)" means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

"Hearing Officer" means a Department of Labor official, whether Administrative Law Judge or Hearing Officer, who is authorized to conduct administrative hearings.

"Immigration and Naturalization Service (INS)" means the component of the U.S. Department of Justice which makes the determination under the Immigration and Nationality Act (INA) on whether or not to grant a visa to an alien seeking to perform temporary agricultural or logging work in the United States.

"Job opportunity" means a job opening for temporary, full-time employment at a place in the United States to which U.S. workers can be referred.

"Local office" means an office of a State employment service agency which serves a particular geographic area within a State.

"Regional Administrator, Employment and Training Administration (RA)" means the chief official of the Employment and Training Administration (ETA) in a Department of Labor (DOL) regional office.

"Secretary" means the Secretary of Labor or the Secretary's designee.

"State agency" means the State employment service agency.

"Temporary labor certification" means the advice given by the Secretary of Labor to the Immigration and Naturalization Service, pursuant to the regulations of that agency at 8 CFR 214.2(h)(3)(i), that (1) there are not sufficient U.S. workers who are qualified and available to perform the work and (2) the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

"United States Employment Service (USES)" means the agency of the U.S. Department of Labor, established

under the Wagner-Peyser Act of 1933, which is charged with administering the national system of public employment offices and carrying out the functions of the Secretary under the Immigration and Nationality Act.

"United States workers" means any worker who, whether U.S. national, citizen or alien, is legally permitted to work permanently within the United States.

§ 655.201 Temporary labor certification applications.

(a) (1) An employer who anticipates a labor shortage of workers for agricultural or logging employment may request a temporary labor certification for temporary foreign workers by filing, or by having an agent file, in duplicate, a temporary labor certification application, signed by the employer, with a local office in the area of intended employment.

(2) If the temporary labor certification application is filed by an agent, however, the agent may sign the application if the application is accompanied by a letter from each employer the agent represent, signed by the employer, which authorizes the agent to act on the employer's behalf and which states that the employer assumes full responsibility for the accuracy of the application, for all representations made by the agent on the employer's behalf, and for the fulfillment of all legal requirements arising under this subpart.

(3) If an association of employers files the application, the association shall identify and submit documents to veify whether, in accordance with the definitions at §655.200, it is (i) the employer, (ii) a joint employer with its member employers, or (iii) the agent of its employer members.

(b) Every temporary labor certification application shall include:

(1) A copy of the job offer which wil be used by the

employer (or each employer) for the recruitment of both U.S. and foreign workers. The job offer for each employer shall state the number of workers needed by the employer, and shall be signed by the employer. The job offer shall comply with the requirements of §655.202 and §658.108 of this chapter;

(2) The assurances required by §655.203; and

(3) The specific estimated date of need of workers.

(c) The entire temporary labor certification application shall be filed with the local office in duplicate and in sufficient time to allow the State agency to attempt to recruit U.S. workers locally and through the Employment Service intrastate and interstate clearance system for 60 calendar days prior to the estimated date of need. Section 655.206 requires the RA to grant or deny the temporary labor certification application by the end of the 60 calendar days, or 20 days from the estimated date of need, whichever is later. That section also requires the RA to offer employers an expedited administrative-judicial Finally, employers need time, after the temporary labor certification applications. Following an administrative-judicial review, the employer has a right to contest any denial before the INS pursuant to 8 CFR 214.2(h)(3)(i). Finally, employers need time, after the temorary labor certification determination, to complete the process for bringing foreign workers into the United States, or to bring an appeal of a denial of an application for the labor certification. Therefore, employers should file their temporary labor certification applications at least 80 days before the estimated date of need specified in the application.

(d) Applications may be amended at any time prior to RA determination to increase the number of workers requested in the original application for labor certification

by not more than 15 percent without requiring an additional recruitment period for U.S. workers. Requests for increases beyond 15 percent may be approved only when it is determined that, based on past experience, the need for additional workers could not be foreseen and that a critical need for the workers would exist prior to the expiration of an additional recruitment period.

(e) If a temporary labor certification application, or any part thereof, does not satisfy the time requirements specified in paragraph (c) of this section, and if the exception in paragraph (d) of this section does not apply, the local office shall immediately send both copies directly to the appropriate Regional Administrator (RA). The RA may then advise the employer and the INS in writing that the temporary labor certification cannot be granted because, pursuant tot he regulations at paragraph (c) of this section, there is not sufficient time to test the availability of U.S. workers. The notice of denial to the employer shall inform the employer of the right to administrative-judicial review and to ultimately petition INS for the admission of the aliens. In emergency situations, however, the RA may waive the time period specified in this section on behalf of employers who have not made use of temporary alien workers for the prior year's harvest or for other good and substantial cause, provided the RA has sufficient labor market information to make the labor certification determinations required by 8 CFR 214.2(h)(3)(i).

§ 655.202 Contents of job offers.

(a) So that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers, each employer's job offer to U.S. workers must offer U.S. workers at least the same benefits

which the employer is offering, intends to offer, or will afford, to temporary foreign workers. Conversely, no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's foreign workers. For example, if the employer intends to advance transportation costs to foreign workers either directly or indirectly (by having them paid by the foreign government involved), the employer must offer to advance the transporation costs of U.S. workers.

(b) Except when higher benefits, wages or working conditions are required by the provisions of paragraph (a) of this section, the Administrator has determined that, in order to protect similarly employed U.S. workers from adverse effect with respect to wages and working conditions, every job offer for U.S. workers must always include the following minimal benefit, wage, and working condition provisions:

(1) The employer will provide the worker with housing without charge to the worker. The housing will meet the full set of Department of Labor, Occupational Safety and Health Administration standards set forth at 29 CFR 1910.142 (or the full set of standards of 20 CFR Part 620, if applicable. See the FEDERAL REGISTER of December 9, 1977, for applicability criteria), except that range housing for sheepherders shall meet guidelines which shall be issued periodically by the Department. When it is the prevailing practice in the area of intended employment to provide family housing, the employer will provide such housing to such workers;

(2)(i) If the job opportunity is covered by the State workers' compensation law, the worker will be eligible for workers' compensation for injury and disease arising out of an in the course of worker's employment; or

(ii) If the job opportunity is not covered by the State workers' compensation law, the employer will provide at

no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment;

(3) The employer will provide without cost to the worker all tools, supplies and equipment required to perform the duties assigned and, if any of these items are provided by the worker, the employer will reimburse the worker for the cost of those so provided;

(4) The employer will provide the worker with three meals a day. The job offer shall state the cost to the worker for such meals. The cost shall not be more than $3.25 per day unless the RA has approved a higher cost pursuant to §655.211.

(5) (i) The employer will provide or pay for the worker's transportation and daily subsistence from the place, from which the worker, without intervening employment, will come to work for the employer, to the place of employment, subject to the deductions allowed by paragraph (b)(13) of this section. The amount of the daily subsistence payment shall be at least as much as the amount the employer will charge the worker with three meals a day during employment;

(ii) If the worker completes the work contract period, the employer will provide or pay for the worker's transporation and daily subsistence from the place of employment to the place, from which the worker, without intervening employment, came to work for the employer, unless the worker has contracted for employment with a subsequent employer who, in that contract, has agreed to pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite; and

(iii) The employer will provide transportation between the worker's living quarters and the employer's worksite without cost to the worker, and such transportation will be in accordance with applicable laws and regulations;

(6)(i) The employer guarantees to offer the worker employment for at least three-fourths of the workdays of the total period during which the work contract and all extensions thereof are in effect, beginning with the first workday after the arrival of the worker at the place of employment and ending on the termination date specified in the work contract, or in its extensions if any. For purposes of this paragrph, a workday shall mean any period consisting of 8 hours of work time. An employer shall not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays. The work must be offered for at least three-fourths of the 8 hour workdays. (That is, ¾ x (number of days x 8 hours)) Therefore, if, for example, the contract contains 20 workdays, the worker must be offered employment for 120 hours during the 20 workdays. A worker may be offered more than 8 hours of work on a single workday. For purposes of meeting the guarantee, however, the worker may not be required to work for more than 8 hours per workday, or on the worker's Sabbath or Federal holidays;

(ii) If the worker will be paid on a piece rate basis, the employer will use the worker's average hourly earnings to calculate the amount due under the guarantee; and

(iii) Any hours which the worker fails to work when the worker has been offered an opportunity to do so pursuant to paragraph (b)(6)(i) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday, or on the worker's Sabbath or Federal holidays) may be counted by the employer in calculating whether the period of guaranted employment has been met;

(7)(i) The employer will keep accurate and adequate records with respect to the workers' earnings, including field tally records, supporting summary payroll records, and records showing: The nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with, and over and above, the guarantee); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay; the worker's earnings per pay period; and the amount of and reasons for any and all deductions made from the worker's wages;

(ii) If the number of hours worked by the worker is less than the number offered in accordance with the guarantee, the records will state the reason or reasons therefor;

(iii) The records, including field tally records and supporting summary payroll records, will be made available for inspection and copying by representatives of the Secretary of Labor, and by the worker and the worker's representatives; and

(iv) The employer will retain the records for not less than three years after the completion of the contract;

(8) The employer will furnish to the worker at or before each payday, in one or more written statements:

(i) The worker's total earnings for the pay period;

(ii) The worker's hourly rate or piece rate of pay;

(iii) The hours of employment which have been offered to the worker (broken out by offers in accordance with, and over and above, the guarantee);

(iv) The hours actually worked by the worker;

(v) An itemization of all deductions made from the worker's wages; and

(vi) If piece rates are used, the units produced daily;

(9) (i) If the worker will be paid by the hour, the employer will pay the worker at least the adverse effect rate; or

(ii) If the worker will be paid on a pice rate basis, the piece rate will be designed to produce average hourly earnings at least equal to the adverse effect rate. If the piece rate does not reult at the end of the pay period in average hourly earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the adverse effect rate, the worker's pay will be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had been paid at the adverse effect rate;

(10) The frequency with which the worker will be paid (in accordance with the prevailing practice in the area of intended employment, or at least biweekly whichever is more frequent);

(11) If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of any worker for whom the employer would have otherwise been required to pay such expenses under paragraph (b)(5)(ii) of this section;

(12) If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire or other Act of God which makes the fulfillment fo the contract impossible, and the RA so certifies, the employer may terminate the work contract. In such cases the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker. If such transfer is not effected, the worker (i) will be returned to the place from which the worker, without

intervening employment, came to work for the employer at the employer's expense; and

(ii) Will be reimbursed the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment borne directly or indirectly by the employer;

(13) The employer will make those deductions from the worker's paycheck which are required by law. The job offer shall specify all deductions, not required by law, which the employer wil make from the worker's paycheck. All deductions shall be reasonable. The employer may deduct the cost fo the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer; in such cases, however, the job offer shall state that the worker will be reimbursed the full amount of such deductions upon the worker's completion of 50 percent of the worker's contract period; and

(14) The employer will provide the worker a copy of the work contract between the employer and the worker. The work contract shall contain all of the provisions required by paragraphs (a) and (b) of this section.

§655.203 Assurances.

As part of the temporary labor certification application, the employer shall include assurances, signed by the employer, that:

(a) The job opportunity is not:

(Vacant because the former occupant is on strike or being locked out in the course of a labor dispute; or

(2) At issue in a labor dispute involving a work stoppage;

(b) During the period for which the temporary labor certification is granted, the employer will comply with applicable Federal, State and local employment-related

laws, including employment related health and safety laws;

(c) The job opportunity is open to all qualified U.S. workers without regard to race, color, national origin, sex, or religion, and is open to U.S. workers with handicaps who are qualified to perform the work. No U.S. worker will be rejected for employment for other than a lawful job related reason;

(d) The employer will cooperate with the employment service system in the active recruitment of U.S. workers until the foreign workers have departed for the employer's place of employment by;

(1) Allowing the employment service system to prepare local, intrastate and interstate job orders using the information supplied on the employer's job offer;

(2) Placing at least two advertisements for the job opportunities in local newspapers of general circulation.

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at least the adverse effect wage rate; give the ¾ guarantee; state that work tools, supplies and equipment will be provided by the employer; state that housing will also be provided, and that transportation and subsistence expenses to the worksite will be provided or paid for by the employer;

(ii) Each advertisement shall diret interested workers to apply for the job opportunity at a local employment service office in their area;

(3) Cooperating with the employment service system in contacting farm labor contractors, migrant workers and other potential workers in other areas of the State and/or Nation by letter and/or telephone;

(4) Cooperating with the employment service system in contacting schools, business and labor organization, fraternal and veterans organizations, and non-profit

organizations and public agencies such as sponsors of programs under the Comprehensive Employment and Training Act, throughout the area of intended employment, in order to enlist them in helping to find U.S. workers; and

(5) If the employer, or an association of employers of which the employer is a member, intends to negotiate and/or contract with the Government of a foreign nation or any foreign association, corporation or organization in order to secure foreign workers, making the same kind and degree of efforts to secure U.S. workers;

(e) From the time the foreign workers depart for the employer's place of employment, the employer will provide employment to any qualified U.S. worker who applies to the employer until fifty percent fo the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer will offer to provide housing, and the other benefits, wages, and working conditions required by §655.202, to any such U.S. worker; and

(f) Performing the other specific recruitment activities specified in the notice from the RA required by §655.205(a).

§655.204 Determinations based on temporary labor certification applications.

(a) Within two working days after the temporary labor certification aplication has been filed with it, the local office shall mail the duplicate application directly to the apropriate RA.

(b) The local office, using the job offer portion of its copy of the temporary labor certification application, shall promptly prepare a local job order and shall begin to recruit U.S. workers in the area of intended employment.

(c) The RA, upon receipt of the duplicate temporary labor certification application, shall promptly review the application to determine whether it meets the requirements of §§655.201-655.203 in order to determine whether the employer's application is (1) timely, and (2) contains offers of wages, benefits, and working conditions required to ensure that similarly employed U.S. workers will not be adversely affected. If the RA determines that the temporary labor certification application is not timely in accordance with §655.201 of this subpart, the RA may promptly deny the temporary labor certification on the grounds that, in accordance with that regulation, there is not sufficient time to adequately test the availability of U.S. workers. If the RA determines that the application does not meet the requirements of §§655.202-655.203 because the wages, working conditions, benefits, assurances, job offer, etc. are not as required, the RA shall deny the certification on the grounds that the availability of U.S. workers cannot be adequately tested because the wages or benefits, etc. do not meet the adverse effect criteria.

(d) If the certification is denied, the RA shall notify the employer in writing of the determination, with a copy to the local office and the Administrator. The notice shall:

(1) State the reasons for the denial citing the relevant regulations; and

(2) Offer the employer an opportunity to request an expedited administrative-judicial review of the denial by a Department of Labor (DOL) Hearing Officer. The notice shall state that, in order to obtain such a review, the employer must, within five calendar days of the date of the notice, telegraph a written request for such a reveiw to the Chief Administrative Law Judge of the Department of Labor (giving the address) and to the Regional Administrator. The notice shall also state that the

employer's request for review should contain any legal arguments which the employer believes will rebut the basis of the RA's denial of certification; and

(3) State that, if the employer does not request an expedited administrative-judicial review before a DOL Hearing Officer within the five days:

(i) The RA will advise the INS that the certification cannot be granted, giving the reasons therefor, and that an administrative-judicial review of the denial was offered to the employer but not accepted, and enclosing, for INS review, the entire temporary labor certification application file; and

(ii) The employer has the opportunity to submit evidence to the INS to rebut the bases of the RA's determination in accordance with the INS regulation at 8 CFR 214.2(h)(3)(i) but that no further review of the employer's application for temporary labor certification may be made by any Department of Labor official.

(e) If the employer timely requests an expedited administrative-judicial review pursuant to paragraph (d)(2) of this section, the procedures of §655.212 shall be followed.

§655.205 Recruitment period.

(a) If the RA determines that the temporary labor certification application meets the requirements of §§655.201-655.203, the RA shall promptly notify the employer in writing, with copies to the State agency and local office The notice shall inform the employer and the State agency of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in §655.203 with respect to the recruitment of U.S. workers. The notice shall require that the job order be placed both into intrastate clearance and

into interstate clearance to such States as the RA shall determine to be potential sources of U.S. workers.

(b) Thereafter, the RA, under the direction of the ETA national office and with the assistance of other RAs with respect to areas outside the region, shall provide overall direction to the employer and the State agency with respect to the recruitment of U.S. workers.

(c) By the 60th day of the recruitment period, or 20 days before the date of need specified in the application, whichever is later, the RA, when making a determination of the availability of U.S. workers, shall also make a determination as to whether the employer has satisfied the recruitment assurances in §655.203. If the RA concludes that the employer has not satisfied the requirement for recruitment of U.S. workers, the RA shall deny the temporary labor certification, and shall immediately notify the employer in writing with a copy to the State agency and local office. The notice shall contain the statements specified in §655.212 shall be followed.

(d) If the employer timely requests an expedited administrative-judicial review before a DOL Hearing Officer, the procedures in §655.212 shall be followed.

§ 655.206 Determinations of U.S. worker availability and adverse effect on U.S. workers.

(a) If the RA, in accordance with §655.205 has determined that the employer has complied with the recruitment assurances, the RA, by 60th day of the recruitment period, or 20 days before the date of need specified in the application, whichever is later, shall grant the temporary labor certification for enough aliens to fill the employer's job opportunities for which U.S. workers are not available. In making this determination the RA shall consider as available for a job opportunity any U.S.

worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads; such a firm commitment shall be considered to have been made not only by workers who have signed work contracts with the employer, but also by those whom the RA determines are very likely to sign such a work contract. The RA shall also count as available any U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related related reasons unless the RA determines that:

(1) Enough qualified U.S. workers have been found to fill all the employer's job oportunities; or

(2) The employer, since the time of the initial determination under §655.204, has adversely affected U.S. workers by offering to, or agreeing to provide to, alien workers better eages, working conditons, or benefits (or by offering or agreeing to impose on alien workers less obligations and restrictions) than that offered to U.S. workers.

(b)(1) Temporary labor certifications shall be considered subject to the conditions and assurances made during the application process. Temporary labor certifications shall be for a limited duration such as for "the 1978 apple harvest season" or "until November 1, 1978", and they shall never be for more than eleven months. They shall be limited to the employer's specific job opportunities; therefore, they may not be transferred from one employer to another.

(2) If an association of employers is itself the employer, as defined in §655.200, certifications shall be made to the association and may be used for any of the job opportunities of its employer members and workers may be transferred among employer members.

(3) If an association of employers is a joint employer with its employer members, as defined in §655.200, the certification shall be made jointly to the association and the employer members. In such cases workers may be transferred among the employer members provided the employer members and the association agree in writing to be jointly and severally liable for compliance with the temporary labor certification obligations set forth in this subpart.

(c) If the RA denies the temporary labor certification in whole or part, the RA shall notify the employer in writing, and by telegram. The notice shall contain all of hte statements required in §655.204(d). If a timely request is made for an administrative-judicial review by a DOL Hearing Officer, the procedures of §655.212 shall be followed.

(d)(1) After a temporary labor certification has been granted, the employer shall continue its efforts to actively recruit U.S. workers until the foreign workers have departed for the employer's place of employment. The employer, however, must keep an active job order on file until the assurance at §655.203(e) is met.

(2) The ES system shall continue to actively recruit and refer U.S. workers as long as there is an active job order on file.

§655.207 Adverse effect rates.

(a) Except as otherwise provided in this section, the adverse effect rates for all agricultural and logging employment shall be the prevailing wage rates in the area of intended employment.

(b)(1) For agricultural employment in the States listed in paragraph (b)(2) of this section, and for Florida sugar cane work, the adverse effect rate for each year shall be computed by adjusting the prior year's adverse effect rate

by the percentage change (from the second year previous to the prior year) in the U.S. Department of Agriculture farm wage rates for agricultural workers. The Administrator shall annually publish adverse effect rates calculated pursuant to this paragraph as a notice in the FEDERAL REGISTER.

(2) *List of States.* Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Maryland, Virginia, and West Virginia. Other States may be added as appropriate.

(c) In any year in which the applicable adverse effect rate is increased, employers shall adjust their piece rates upward to avoid requiring a worker to increase his or her productivity over the previous year in order to earn an amount equal to what the worker would earn if the worker were paid at the adverse effect rate.

(d) The Administrator may periodically publish adverse effect piece rates for selected occupations. If the Administrator decides to do so, the methodology for establishing such piece rates shall be published as proposed rulemaking as an amendment to this section. The methodology shall take into account the changes in adverse effect rates. After the methodology is published as final rulemaking, the Administrator may publish adverse effect piece rates, calculated pursuant to the methodology, by notice in the FEDERAL REGISTER.

§655.208 Temporary labor certification applications involving fraud or willful misrepresentation.

(a) If possible fraud or willful misrepresentation involving a temporary labor certification application is discovered prior to a final temporary labor certification determination, or it it is learned that the employer or agent (with respect to an application) is the subject of a

criminal indictment or information filed in a court, the RA shall refer the matter to the INS for investigation and shall notify the employer or agent in writing of this referral. The RA shall continue to process the application and may issue a qualified temporary labor certification.

(b) If a court finds an employer or agent innocent of fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute an employer or agent, the RA shall not deny the temporary labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this subpart.

(c) If a court or the INS determines that there was fraud or willful misrepresentation involving a temporary labor certification application, the application shall be deemed invalidated, processing shall be terminated, and the application shall be returned to the employer or agent with the reasons therefor stated in writing.

§655.209 Invalidation of temporary labor certifications.

After issuance, temporary labor certifications are subject to invalidation by the INS upon a determination made in accordance with that agency's procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the temporary labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Administrator, the Regional Administrator or Administrator as appropriate, shall notify the INS in writing.

§655.210 Failure of employers to comply with the terms of a temporary labor certification.

(a) If, after the granting of a temporary labor certification, the RA has probable cause to believe that an employer has not lived up to the terms of the temporary labor certification, the RA shall investigate the matter. If the RA concludes that the employer has not complied with the terms of the labor certification, the RA may notify the employer that it will not be eligible to apply for a temporary labor certification in the coming year. The notice shall be in writing, shall state the reasons for the determination, and shall offer the employer an opportunity to request a hearing within 30 days of the date of the notice. If the employer requests a hearing within the 30-day period, the RA shall follow the procedures set forth at §658.421(i)(1), (2) and (3) of this chapter. The procedures contained in §658.421(j), 658.422 and 658.423 of this chapter shall apply to such hearings.

(b) No other penalty shall be imposed by the employment service on such an employer other than as set forth in paragraph (a) of this section.

§655.211 Petitions for higher meal charges.

(a) An RA may permit an employer to charge workers up to $4 for providing them with 3 meals per day if the employer justifies the charge by submitting documentary evidence to the RA. A denial in whole or in part shall be reviewable as provided in §655.212.

(b) Evidence submitted shall include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: Food; kitchen supplies other than food, such as lunch bags and soap; labor costs which have a direct

relation to food service operations, such as wages of cooks and restaurant supervisors; fuel, water, electricity, and other utilities used for the food service opeations; other costs directly related to the food service operation. Charges for transportation, depreciation, overhead, and similar charges may not be included. Receipts and other cost records for a representative pay period shall be available for inspection by the Secretary's representatives for a period of one year.

§655.212 Administrative-judicial reviews.

(a) Whenever an employer has requested an administrative-judicial review of a denial of an application or petition in accordance with §§655.204(d), 655.205(d), 655.206(c), or 655.211 by telegram, the Chief Admnistrative Law Judge shall immediately assign a Hearing Officer to review the record for legal sufficiency, and the Regional Administrator shall send a certified copy of the case file to the Chief Administrative Law Judge by means normally assuring next day delivery. The Hearing Officer shall not have authority to remand the case and shall not receive additional evidence. Any contervailing evidence advanced after decision by the Regional Administrator shall be subject to provisions of 8 CFR 214.2(h)(3)(i).

(b) The Hearing Officer, within five working days after receipt of the case file shall, on the basis of the written record and due consideration of any written memorandums of law submitted, either affirm, reverse or modify the RA's denial by written decision. The decision of the Hearing Officer shall specify the reasons for the action taken and shall be immediately provided to the employer, RA, Administrator, and INS by telegram or hand delivery. The Hearing Officer's decision shall be the final decision of the Department of Labor and no further review shall be given to the temporary labor certification determination by any Department of Labor official.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALFRED L. SNAPP & SON, INC., *et al.*,
Petitioners,

v.

COMMONWEALTH OF PUERTO RICO on the relation of PEDRO BAREZ, SECRETARY, DEPARTMENT OF LABOR and HUMAN RESOURCES,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTRODUCTION

Petitioners Alfred L. Snapp & Sons, Inc., *et al.*, submit this supplemental brief in support of their petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit pursuant to Sup. Ct. R. 22.6. The petition for writ of certiorari was filed in this Court on February 2, 1981. On February 4, 1981, oral argument was held in the United States Court of Appeals for the Second Circuit in the companion suit of *Commonwealth of Puerto Rico, Etc. v. Bramkamp*, Docket No. 79-7777 (2d Cir.). *See* Petition for Writ of Certiorari, at 9-10. Following oral argument, the Second Circuit requested the Solicitor General of the United States to file an *amicus curiae* brief on behalf of the appropriate government agencies on the issues involved

in this appeal. On April 6, 1981, the United States Secretary of Labor filed an *amicus* brief with the Second Circuit. In the opinion of counsel for petitioners, the *amicus* brief of the U.S. Secretary of Labor raises issues that are germane to the immediate issue of whether the Court should grant the petition for writ of certiorari and to the ultimate issue of whether the Commonwealth of Puerto Rico has *parens patriae* standing to sue the Virginia apple growers who allegedly violated the contractual and federal regulatory rights of Puerto Rican workers.

ARGUMENT

Allowing the Commonwealth of Puerto Rico to Sue As *Parens Patriae* in Cases Like This Will Unnecessarily Clog the Federal Courts With Cases That Could Be Resolved Through the U.S. Department of Labor's Employment Service Complaint System.

The U.S. Department of Labor (hereinafter referred to as the "USDOL") has established a complaint system to investigate and resolve complaints by employees that an employer has violated the USDOL's employment service system regulations. *See* 20 C.F.R. Part 658. It is apparent from the *amicus* brief filed by the USDOL with the Second Circuit in connection with the companion suit of *Commonwealth of Puerto Rico, Etc. v. Bramkamp*, No. 79-7777 (2d Cir.), that the Commonwealth of Puerto Rico is attempting to circumvent the USDOL's employment service complaint system.[1] Allowing the Commonwealth of Puerto Rico to circumvent the USDOL employment service complaint system and sue as *parens patriae* in cases like this will unnecessarily clog the

[1] Although the USDOL concluded that ". . . federal policy considerations do not weigh against granting the Commonwealth standing to pursue its action as *parens patriae*," Amicus Brief, at 10, counsel for petitioners believe that that conclusion is not justified by the facts, as will be explained more fully in this Supplemental Brief.

federal courts with cases that the complaint system was created to resolve.

In its complaint, the Commonwealth of Puerto Rico alleged that the Virginia apple growers violated the USDOL's regulations. It is not surprising that the USDOL has the authority to investigate alleged violations of its own regulations. The USDOL points out in its *amicus* brief that it ". . . may initiate an investigation when it has 'probable cause to believe that an employer has not lived up to the terms of the temporary labor certification.'" Brief for the Secretary of Labor as Amicus Curiae (hereinafter referred to as "Amicus Brief"), at 6; *see also* 20 C.F.R. § 655.210(a). As the USDOL also points out, ". . . Department regulations provide for the investigation of all complaints relating to failure to comply with the terms of the job offer or other applicable provisions." Amicus Brief, at 7; *see also* 20 C.F.R. Part 658.[2]

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[2] The USDOL disingenuously suggests in its *amicus* brief that ". . . the complaint system does not contemplate injunctive relief or attendant contempt proceedings." Amicus Brief, at 12. The USDOL, however, may deny access to the employment service system or future temporary labor certification to any employer who has been found to have violated the terms of a temporary labor certification. *See* 20 C.F.R. § 655.210(a) and § 658.502. Since the New York and Virginia apple growers have been unable to recruit sufficient local labor to harvest their crops for close to three decades, the possibility of denial of access to the employment service system and of temporary foreign labor certification represents a threat to them as serious as any contempt citation. Without sufficient labor to harvest their apples, the apple growers would suffer serious financial losses and probable bankruptcy. In fact, denial of access to the employment service system and of foreign labor certification would accomplish the same result as the injunction which the Commonwealth of Puerto Rico seeks to obtain in this case, since the effect of both are dependent on the grower continuing to utilize the employment service system and to seek temporary foreign labor certification. Furthermore, the USDOL does have the authority to go into court to seek injunctive relief and

Significantly, the USDOL's regulations place the initial responsibility for investigating employee complaints with the state employment agency in the state where the violation allegedly occurred. According to the USDOL's *amicus* brief, "[a]n aggrieved individual may file a complaint with any state employment agency; *but the complaint will be investigated by the state in which the alleged violation occurred.*" Amicus Brief, at 7. (Emphasis added.) "For example, a Puerto Rican worker involved in the apple harvest in New York state could file a complaint in New York or with the Puerto Rico employment agency upon his return. In the latter event, the Puerto Rico agency would forward the complaint to New York for processing." Amicus Brief, at 7-8; *see also* 20 C.F.R. § 658.412(d). Thus, the USDOL's own regulations clearly contemplate that a labor supply state, such as the Commonwealth of Puerto Rico in this case, will play no role in the investigation of employee complaints when the work has been performed in another state, other than forwarding the complaints to the state where the work was performed. There are sound reasons for such a policy, since the state agency where the work was performed is in a much better position to investigate such complaints than a state agency hundreds of miles away from where the alleged violation occurred.

Not only do the USDOL's regulations contemplate that employee complaints will be investigated by the state employment agency in the state where the violations allegedly occurred, but both the Virginia and New York state employment agencies investigated complaints by Puerto Ricans who worked in the 1978 apple harvest and were unable to substantiate any of them. In the case

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attendant contempt proceedings itself. In fact, it has sought to do so on previous occasions. *See, e.g., Western Colorado Fruit Growers Association v. Marshall*, 483 F. Supp. 693, 698 (D.C. Colo. 1979).

of the Puerto Rican workers who worked in New York, the USDOL last August filed a Memorandum in Response to Plaintiffs' Motion for a Preliminary Injunction Against the Federal Defendants in the case of *Rios v. Marshall*, No. 79 Civ. 5711 (S.D.N.Y., filed October 22, 1979), a case brought in part by 13 Puerto Ricans involved in the 1978 New York apple harvest against some of the same New York apple growers sued by the Commonwealth of Puerto Rico in the *Bramkamp* case, *supra*. Attached to the USDOL's Memorandum was the affidavit of Mr. Kenneth Hamlett, Regional Monitor/Advocate for the Employment and Training Administration of the USDOL. His affidavit stated, in part, that

> "Mr. Rios' complaint was one of approximately 120 complaints filed by Puerto Rican workers as a result of their experiences in the 1978 New York apple harvest . . . At the present time, all of the 120 complaints have been resolved at the State level of the administrative complaint system. *In all cases, New York State was unable to substantiate the complaints of those workers.* Upon the completion of the State's action, each of the 120 workers was advised of the administrative determination by New York and also advised of their right to appeal that determination to the Federal Regional Administration. Only ten workers took an appeal."

See Affidavit of Kenneth Hamlett of August 7, 1980, attached as Appendix B to the Memorandum in Response to Plaintiffs' Motion for a Preliminary Injunction Against the Federal Defendants, *Rios v. Marshall, supra*. (Emphasis added.) In the case of the Puerto Ricans who worked in Virginia, counsel for petitioners have been informed by the Virginia Employment Commission that 178 Puerto Ricans who worked in the 1978 Virginia apple harvest filed complaints and that in all cases the Virginia Employment Commission was unable to sub-

stantiate the complaints of those workers.[3] Only 23 workers filed an appeal. The Regional Administrator for Region III of the Employment and Training Administration subsequently substantiated that, in the case of 14 of the appealed cases, there were no employer violations. The remaining nine appeals are still pending. *See* letter of August 22, 1980, from Associate Regional Administrator Martin Weinles to Arthur L. Lane, Jr., Commissioner of the Virginia Employment Commission, a copy of which appears at Appendix A hereof.

The USDOL also points out in its *amicus* brief that "[t]he regulations . . . provide that a party may appeal the state's decision to the Regional Administrator of the Department of Labor, 20 C.F.R. § 658.418(c), after he has exhausted his state remedies, 20 C.F.R. § 658.421(a). The Department of Labor may conduct further investigation of and a hearing on the complaint. 20 C.F.R. § 658.421(c) and (e), 658.424." Amicus Brief, at 8. In fact, after the New York State Job Service investigated complaints of 120 Puerto Ricans involved in the 1978 New York apple harvest and was unable to substantiate any of them, the Commonwealth of Puerto Rico actually appealed one of the decisions of the New York State Job Service to the Regional Administrator's office on behalf of the complaining Puerto Rican worker. *See* letter of April 7, 1980, from Leandro L. Pena, Director of the Bureau of Employment Security of the Department of Labor and Human Resources of the Commonwealth of Puerto Rico, to Regional Administrator James A. Ware, attached to Exhibit 3 to Affidavit of Kenneth Hamlett, *supra*, a copy of which appears at Appendix B hereof.

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[3] The information relating to the Virginia complaints was obtained from Ms. Jeff Hudson, State Monitor/Advocate of the Virginia Employment Commission. Twenty-two of the 178 complaints were actually filed against the Department of Labor and Human Resources of the Commonwealth of Puerto Rico.

Obviously, the USDOL's employment service complaint system provides a means of investigating and resolving employee complaints without getting the federal courts involved. In fact, both the New York and Virginia state employment agencies investigated all the Puerto Rican complaints in 1978 and were unable to substantiate any of them. Relatively few of the Puerto Ricans who filed complaints elected to appeal the decisions of the New York and Virginia state agencies to the Regional Administrator's office as specifically provided for in the USDOL's regulations. If the Commonwealth of Puerto Rico was not satisfied with the results of the investigations and had information that those state agencies had failed to consider, it should have brought such facts to the attention of the Regional Administrators for the respective regions. In fact, it did file an appeal on behalf of at least one Puerto Rican worker. If it did not have any information that would have established violations by the apple growers, it had no basis for bringing the two lawsuits.[4] In either case, the Commonwealth of Puerto Rico's attempt to sue the apple growers for alleged violations of the USDOL's employment service system regulations flouts the very regulations it seeks to enforce. Per-

[4] There was no mention in the USDOL's *amicus* brief of the investigations into the complaints by the Puerto Rican workers in 1978. It is not surprising, therefore, that the USDOL's *amicus* brief did not even address the issue of whether the Commonwealth of Puerto Rico should be permitted to second-guess the USDOL by bringing a *parens patriae* action for the enforcement of USDOL regulations after the USDOL has already investigated and found no basis for the alleged violations. Permitting enforcement activities of the same regulations by both the USDOL and the Commonwealth of Puerto Rico would be needlessly duplicative and would wastefully consume judicial resources. Moreover, the growers would be subjected to impossible burdens if they had to defend themselves, in turn, against administrative investigations by the USDOL, *parens patriae* lawsuits by the Commonwealth of Puerto Rico, and individual lawsuits by the Puerto Rican workers themselves.

mitting the Commonwealth of Puerto Rico to skirt the employment service complaint system which was designed to resolve such disputes will clog the overburdened federal courts with cases that could have been and, for the most part, were resolved administratively.

CONCLUSION

The Commonwealth of Puerto Rico is attempting to sue as *parens patriae* on behalf of Puerto Rican workers who could have had their complaints resolved through the U.S. Department of Labor's employment service complaint system. Permitting the Commonwealth of Puerto Rico to do so will clog the overburdened federal courts with cases that could have been and, for the most part, were resolved administratively. This is another reason why the Commonwealth of Puerto Rico should not be permitted to sue as *parens patriae* in this case.

Respectfully submitted,

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Washington, D.C. 20036
202/466-7330
Attorney for Petitioners

Of Counsel:

CHARLES, KARALEKAS, BACAS
& MCCAHILL
S. STEVEN KARALEKAS

May 1, 1981

APPENDIX A

[EMBLEM]

U.S. DEPARTMENT OF LABOR
Employment and Training Administration
P.O. Box 8796
Philadelphia, Pennsylvania 19101

Reply to the Attention of: III TGE-MA

Aug. 22, 1980

Arthur L. Lane, Jr., DPA
Commissioner
Virginia Employment Commission
Post Office Box 1358
Richmond, Virginia 23211

Dear Dr. Lane:

Enclosed are copies of 23 letters to farmworkers who have appealed State agency determinations regarding their complaints to the Regional Administrator. These complaints were originally filed regarding events which occurred during the 1978 apple harvest.

We have reviewed each case and have made a final determination in 14 of the cases. In 9 cases, the National Solicitor's Office is continuing to investigate.

Please arrange to prepare your files, on the cases where final determinations have been made, for possible litigation. Please provide the National Solicitor's Office with any assistance they may require concerning any case where a final determination has not yet been made.

Thank you for your assistance and cooperation.

Sincerely,

/s/ Martin Weinles
MARTIN WEINLES
Associate Regional Administrator
Office of Job Service

Enclosures [only two of 23 enclosures are attached]

[EMBLEM]

U.S. DEPARTMENT OF LABOR
Employment and Training Administration
P.O. Box 8796
Philadelphia, Pennsylvania 19101

Reply to the Attention of: III TGE-MA

Aug. 8, 1980

REGISTERED MAIL

Mr. Jose Rosario Lopez
Bo. Quebradilla (General Delivery)
Barranquitas, Puerto Rico 00618

Dear Mr. Lopez:

On August 1, 1979, this office received your complaint, filed November 14, 1978, with the Puerto Rico Department of Labor and Human Resources against Alfred L. Snapp and Son, Inc. Pursuant to 20 C.F.R. Section 658.412, this office forwarded your complaint to the appropriate local State employment office for investigation.

On October 22, 1979, you were sent the determination of the State agency which concluded that Alfred L. Snapp and Son, Inc. did not violate the terms and conditions of employment specified in the Interstate Clearance Job Order on which you were referred. Subsequent to this determination this office received written notification of your intent to appeal the determination of the State agency.

Pursuant to 20 C.F.R. Section 658.421, this office reviewed the State agency file and further requested any additional information or documentation from you and the Puerto Rico Employment Service regarding your appeal. Based upon the information provided to this office, it is my determination that the State agency was correct in finding no material violation of the employment

service regulations. Therefore, this determination constitutes the final decision of the Secretary of the United States Department of Labor.

Sincerely,

/s/ William J. Haltigan
WILLIAM J. HALTIGAN
Regional Administrator

cc. Reading, Dower, Job Service, CAO-3, VA SESA, Puerto Rico SESA, National SOL, Puerto Rico Legal Services, Alfred L. Snapp & Son, Inc.
Route 4, Box 444
Winchester, Virginia 22601

[EMBLEM]

U.S. DEPARTMENT OF LABOR
Employment and Training Administration
P.O. Box 8796
Philadelphia, Pennsylvania 19101

Reply to the Attention of: III TGE-MA

Aug. 8, 1980

REGISTERED MAIL

Mr. Jose L. Vargas Arroyo
Bo. Barrero, Buzon 924
Rincon, Puerto Rico 00743

Dear Mr. Arroyo:

On December 18, 1978, this office received your complaint, filed September 29, 1978, with the Puerto Rico Department of Labor and Human Resources against Frederick Farms. Pursuant to 20 C.F.R. Section 658.412, this office forwarded your complaint to the appropriate local State employment office for investigation.

On April 13, 1979, you were sent the determination of the State agency which concluded that Frederick Farms did not violate the terms and conditions of employment specified in the Interstate Clearance Job Order on which you were referred. Subsequent to this determination this office received written notification of your intent to appeal the determination of the State agency.

Pursuant to 20 C.F.R. Section 658.421, this office reviewed the State agency file and further requested any additional information or documentation from you and the Puerto Rico Employment Service regarding your appeal. Based upon the information provided to this office, it is my determination that further investigation of your complaint is warranted. This office, in conjunction with the Office of the Solicitor of Labor, is therefore, continuing

to investigate the circumstances giving rise to your complaint. Accordingly, we again request that if you have any additional information or documentation which relate to your complaint, please forward copies to this office for inclusion in your file.

Sincerely,

/s/ William J. Haltigan
WILLIAM J. HALTIGAN
Regional Administrator

cc. Reading, Dower, Job Service, CAO-3, VA SESA, Puerto Rico SESA, National SOL, Puerto Rico Legal Services, Frederick Farms
P.O. Box 24
Winchester, Virginia 22601

APPENDIX B

COMMONWEALTH OF PUERTO RICO
DEPARTMENT OF LABOR AND
HUMAN RESOURCES
BUREAU OF EMPLOYMENT SECURITY
Hato Rey, Puerto Rico

OFFICE OF THE DIRECTOR

April 7, 1980

Mr. James A. Ware
Regional Administrator
U.S. Department of Labor
Employment and Training Administration
1515 Broadway
New York, New York 10036

Attention: Mr. Ken Hamlett

Dear Mr. Ware:

This is in relation to a complaint filed by Mr. Juan Valderrama, SS# 583-43-6006, against employer Altamont Farm, Inc., Milton, N.Y., pursuant to the 1978 apple harvest.

Mr. Valderrama is not satisfied with the decision taken by the Department of Labor of the State of New York in the resolution of his complaint. He wishes to appeal this decision and has requested us to act on his behalf.

With this appeal we include copy of the Opinion and Sentence issued by a Superior Court of Puerto Rico as a result of a lawsuit filed against Altamont Farms, Inc. by Nelly Ríos, et al., among which is Mr. Juan Valderrama (Civil Number 78-6106 (901)-San Juan Superior Court).

The above mentioned resolution appears to be in direct conflict with the conclusions reached by the New York Department of Labor in Mr. Valderrama's as well as in other complaints filed against Altamont Farms, Inc.

Thank you for your attention to this matter.

Sincerely,

/s/ Leandro L. Pena
LEANDRO L. PENA
Director

Enclosures

Office - Supreme Court, U.S.
FILED
JAN 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 80-1305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALFRED L. SNAPP & SON, INC., *et al.*,
Petitioners,

v.

COMMONWEALTH OF PUERTO RICO
On the relation of Pedro Barez, Secretary,
Department of Labor and Human Resources,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT APPENDIX

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Washington, D.C. 20006
(202) 624-8870
Counsel for Respondent

PETITION FOR CERTIORARI FILED FEBRUARY 2, 1981.
CERTIORARI GRANTED NOVEMBER 30, 1981.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1305

ALFRED L. SNAPP & SON, INC., *et al.*,
Petitioners,

v.

COMMONWEALTH OF PUERTO RICO
On the relation of Pedro Barez, Secretary,
Department of Labor and Human Resources,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Order of the U.S. Court of Appeals for the Fourth Circuit denying petition for rehearing and suggestion for rehearing in banc, Filed December 16, 1980..Pet. App. A27

The following opinions, decisions, judgments and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the U.S. District Court for the Western District of Virginia, filed April 19, 1979 and reported at 469 F. Supp. 928 (W.D.Va. 1979) A1

Opinion of the U.S. Court of Appeals for the Fourth Circuit, filed October 9, 1980 and reported at 632 F.2d 365 (4th Cir. 1980) A16

Order of the U.S. Court of Appeals for the Fourth Circuit denying petition for rehearing and suggestion for rehearing in banc, entered on December 16, 1980 ..... A27

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 11, 1979—Plaintiff's original complaint filed in U.S. District Court for the Western District of Virginia.

February 15, 1979—Defendants' motion to dismiss filed together with memorandum of points and authorities in support thereof.

March 2, 1979—Plaintiff's first amended complaint filed.

March 2, 1979—Plaintiff's memorandum of points and authorities in opposition to defendants' motion to dismiss filed.

March 5, 1979—Plaintiff's second amended complaint filed.

March 5, 1979—Plaintiff's supplemental memorandum of points and authorities in opposition to defendants' motion to dismiss filed.

March 9, 1979—Defendants' reply to plaintiff's memorandum of points and authorities in opposition to defendants' motion to dismiss filed.

April 19, 1979—Opinion and order granting defendants' motion to dismiss for lack of *parens patriae* standing.

May 16, 1979—Plaintiff's notice of appeal filed.

October 9, 1980—Opinion and judgment of the U.S. Court of Appeals for the Fourth Circuit reversing the district court.

October 17, 1980—Defendants' motion for extension of time to file petition for rehearing filed.

October 27, 1980—Defendants' petition for rehearing and suggestion for rehearing in banc filed.

December 16, 1980—Order of U.S. Court of Appeals for the Fourth Circuit denying defendants' petition for rehearing and suggestion for rehearing in banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

Civil Action No. 79-0007(H)

THE COMMONWEALTH OF PUERTO RICO on the Relation of CARLOS S. QUIROS, Secretary, Department of Labor and Human Resources,

Plaintiff,

v.

ALFRED L. SNAPP & SON, INC., *et al.*,

Defendants.

SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

JURISDICTION AND VENUE

1. This is a civil action to declare unlawful actions of defendants and their officers, agents and employees with respect to migrant Puerto Rican farm workers referred pursuant to clearance orders filed in the Federal Employment Service System by or on behalf of defendants. This action seeks also to permanently enjoin defendants from future violations of law respecting migrant Puerto Rican farm workers. This case arises under the Wagner-Peyser Act of 1933, 29 U.S.C. §§ 49 *et seq.*, the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §§ 1101 *et seq.*, Labor Certification Process Regulations promulgated at 20 C.F.R., Chapter V, Part 655 and Wagner-Peyser Act regulations promulgated at 20 C.F.R., Chapter V, Part 655.

2. Jurisdiction of this Court is founded upon 28 U.S.C. §§ 1331 and 1337 in that the action arises under an Act of Congress regulating commerce among the States. There is now existing between the parties an actual and justiciable matter in controversy exceeding the sum or value of $10,000 exclusive of interest and costs.

3. Venue is properly situated in this District pursuant to 28 U.S.C. § 1391(b) and (c).

THE PARTIES

4. Plaintiff Carlos S. Quiros is Secretary of the Department of Labor and Human Resources (hereinafter "the Labor Department"), an agency of the executive branch of the government of the Commonwealth of Puerto Rico. As Secretary of the Labor Department, plaintiff Quiros is charged by law with direction, administration and general supervision of the Labor Department, itself charged by law to encourage and develop the interests and welfare of the laborers of Puerto Rico, to improve their working conditions and to promote their opportunities to obtain profitable employment. 3 L.P.R.A. §§ 305,306. For the month of September, 1978, overall adult unemployment on the island of Puerto Rico was 18.5%. During that same month, rural unemployment on the island of Puerto Rico was 23%. With specific reference to migrant Puerto Rican workers recruited for mainland employment through the Federal Employment Service System (hereinafter "FESS"), plaintiff Quiros is vested with authority to guarantee compliance with the conditions stipulated in the employment offer made by any employer through the said System. § 3 Pub.L.87, as amended July 13, 1978.

5. Defendant Alfred L. Snapp & Son, Inc. is a corporation established under the laws of the Commonwealth of Virginia and is engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. Through its officers, agents and employees, it submitted a clearance order with the Virginia Employment Commission, part of the FESS, on or about April 28, 1978 containing a job offer for forty-two (42) unskilled agricultural laborers to work the 1978 apple harvest.

6. Defendant Alfred L. Snapp, Sr., is president of defendant Alfred L. Snapp & Son, Inc. and as such is responsible for the filing of the clearance order with the Virginia Employment Commission on or about April 28,

1978 by Alfred L. Snapp, Jr. an employee of Alfred L. Snapp & Son. Inc.

7. Defendant John T. Watt & Son, doing business as Timber Ridge Fruit Farm is a corporation established under the laws of the Commonwealth of Virginia engaged in the business of growing, harvesting and marketing apples at orchards located at or near Gore, Virginia. Through its officers, agents and employees, it submitted a clearance order with the Virginia Employment Commission, part of the FESS, on or about April 28, 1978 containing a clearance order for fifteen (15) unskilled agricultural laborers to work the 1978 apple harvest.

8. Defendant John T. Watt is president of defendant John T. Watt & Son, doing business as Timber Ridge Fruit Farm and as such is responsible for the filing of a clearance order with the Virginia Employment Commission on or about April 28, 1978.

9. Defendant Orchard Management Co., Inc. is a corporation established under the laws of the Commonwealth of Virginia and is engaged in the business of growing, harvesting, and marketing apples at orchards located at or near Berryville, Virginia. Through its officers, agents and employees it submitted a clearance order with the Virginia Employment Commission, part of the FESS, on or about April 28, 1978 containing a job offer for thirty-five (35) unskilled agricultural laborers to work the 1978 apple harvest.

10. Defendant Harry F. Byrd, III is president of defendant Orchard Management Co., Inc. and as such is responsible for the filing of a clearance order with the Virginia Employment Commission on or about April 28, 1978.

11. Defendant D.K. Russell and Sons, Inc. is a corporation established under the laws of the Commonwealth of Virginia and is engaged in the business of growing, harvesting and marketing apples at orchards located at or near Clearbrook, Virginia. Through its officers, agents and employees it submitted a clearance order with the

Virginia Employment Commission, part of the FESS, on or about April 28, 1978 containing a job offer for seventy (70) unskilled agricultural laborers to work the 1978 apple harvest.

12. Defendant J. Robert Russell is president of defendant D.K. Russell and Sons, Inc. and as such is responsible for the filing of a clearance order with the Virginia Employment Commission on or about April 28, 1978.

13. Defendant Whitman Orchards is a corporation established under the laws of the Commonwealth of Virginia and is engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. Through its officers, agents and employees it submitted a clearance order with the Virginia Employment Commission, part of the FESS, on or about April 28, 1978 containing a job offer for twelve (12) unskilled agricultural laborers to work the 1978 apple harvest.

14. Defendant Gordon T. Whitman is president of defendant Whitman Orchards and as such is responsible for the filing of a clearance order with the Virginia Employment Commission on or about April 28, 1978.

15. Defendant Robert Boyd T/A Cloverdale Farm is a corporation established under the laws of the Commonwealth of Virginia and is engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. Through its officers, agents and employees it submitted a clearance order with the Virginia Employment Commission, part of the FESS, on or about April 28, 1978 containing a job offer for eighteen (18) unskilled agricultural labors to work the 1978 apple harvest.

16. Defendant Robert J. Boyd is president of defendant Robert Boyd T/A Cloverdale Farm and as such is responsible for the filing of a clearance order with the

Virginia Employment Commission on or about April 28, 1978.

17. The C.L. Robinson Corp. is a corporation established under the laws of the Commonwealth of Virginia and is engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. Through its officers, agents and employees it submitted a clearance order with the Virginia Employment Commission, part of the FESS, on or about April 28, 1978 containing a job offer for sixty (60) unskilled agricultural laborers to work the 1978 apple harvest.

18. Defendant Delmar Robinson, Jr. is president of defendant The C.L. Robinson Corp. and as such is responsible for the filing of a clearance order with the Virginia Employment Commission on or about April 28, 1978.

19. Defendant R & T Packing Corp. is a corporation established under the laws of the Commonwealth of Virginia and is engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. Through its officers, agents and employees it submitted a clearance order with the Virginia Employment Commission, part of the FESS, on or about April 28, 1978 containing a job offer for seventy (70) unskilled agricultural laborers to work the 1978 apple harvest.

20. Defendant C. Robert Solenberger is president of defendant R & T Packing Corp. and as such is responsible for the filing of a clearance order with the Virginia Employment Commission on or about April 28, 1978.

21. Defendant E. Blackburn Moore is a sole proprietor engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. On or about April 28, 1978 defendant Moore

filed a clearance order with the Virginia Employment Commission, part of the FESS, containing a job offer for thirty-five (35) unskilled agricultural laborers to work the 1978 apple harvest.

22. Defendant Fred L. and Philip B. Glaize d/b/a Crescent Orchards is a partnership established under the laws of the Commonwealth of Virginia and is engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. Through its officers, agents and employees it submitted a clearance order with the Virginia Employment Commission, part of the FESS, on or about April 28, 1978 containing a job offer for seventy-five (75) unskilled agricultural laborers to work the 1978 apple harvest.

23. Defendant Philip B. Glaize is a partner of defendant Crescent Orchards and as such is responsible for the filing of a clearance order with the Virginia Employment Commission on or about April 28, 1978.

24. Defendant Fred L. Glaize is a partner of defendant Crescent Orchards and as such is responsible for the filing of a clearance order with the Virginia Employment Commission on or about April 28, 1978.

25. Defendant Frederick Farms is a business entity established under the laws of the Commonwealth of Virginia and is engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. Through its officers, agents and employees it submitted a clearance order with the Virginia Employment Commission, part of the FESS, on or about April 28, 1978 containing a job offer for twelve (12) unskilled agricultural laborers to work the 1978 apple harvest.

26. Defendant James R. Robinson is manager of defendant Frederick Farms and as such is responsible for the filing of a clearance order with the Virginia Employ-

ment Commission, part of the FESS, on or about April 28, 1978.

27. Defendant George B. Whitacre is a sole proprietor engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. On or about April 28, 1978 he filed a clearance order with the Virginia Employment Commission, part of the FESS, containing a job offer for twenty (20) unskilled agricultural laborers to work the 1978 apple harvest.

28. Defendant H.F. and T.B. Byrd is a business entity established under the laws of the Commonwealth of Virginia and is engaged in the business of growing, harvesting and marketing apples at orchards located at or near Mt. Jackson, Virginia. Through its officers, agents and employees it submitted a clearance order with the Virginia Employment Commission, part of the FESS, on or about April 28, 1978 containing a job offer for forty-eight (48) unskilled agricultural laborers to work the 1978 apple harvest.

29. Defendant John E. Crumpacker is manager of defendant H.F. and T.B. Byrd and as such is responsible for the filing of a clearance order with the Virginia Employment Commission on or about June 30, 1978.

30. Defendant H.F. Byrd is upon information and belief, a part-owner of defendant H.F. & T.B. Byrd and as such is responsible for the filing of a clearance order with the Virginia Employment Commission on or about April 28, 1978.

31. Defendant T.B. Byrd is upon information and belief, a part-owner of defendant H.R. and T.B. Byrd and as such is responsible for the filing of a clearance order with the Virginia Employment Commission on or about April 28, 1978.

32. Defendant Harvy Brumback is a sole proprietor engaged in the business of growing, harvesting and mar-

keting apples at orchards located at or near Winchester, Virginia. On or about April 28, 1978 defendant Brumback filed a clearance order with the Virginia Employment Commission, part of the FESS, containing a job offer for eight (8) unskilled agricultural laborers to work the 1978 apple harvest.

33. Defendant James Clevenger is a sole proprietor engaged in the business of growing, harvesting and marketing apples at orchards located at or near Boyce, Virginia. On or about April 28, 1978 defendant Clevenger filed a clearance order with the Virginia Employment Commission, part of the FESS, containing a job offer for forty (40) unskilled agricultural laborers to work the 1978 apple harvest.

34. Defendant McDonald Farms is a business entity established under the laws of the Commonwealth of Virginia and is engaged in the business of growing, harvesting and marketing apples at orchards located at or near Stephens City, Virginia. Though its officers, agents and employees it submitted a clearance order with the Virginia Employment Commission, part of the FESS, on or about April 28, 1978 containing a job offer for sixteen (16) unskilled agricultural laborers to work the 1978 apple harvest.

35. Defendant James Kenneth McDonald is a partner of defendant McDonald Farms and as such is responsible for the filing of the clearance order with the Virginia Employment Commission on or about April 28, 1978.

36. Defendant Messick & Beaver is a partnership established under the laws of the Commonwealth of Virginia and is engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. Through its officers, agents and employees it submitted a clearance order with the Virginia Employment Commission, part of the FESS, on or about April 28, 1978 containing a job offer for twenty-

three (23) unskilled agricultural laborers to work the 1978 apple harvest.

37. Defendant Albert W. Messick is a partner of defendant Messick & Beaver and as such is responsible for the filing of the clearance order with the Virginia Employment Commission on or about April 28, 1978.

38. Defendant James Beaver is a partner of defendant Messick & Beaver and as such is responsible for the filing of the clearance order with the Virginia Employment Commission on or about April 28, 1978.

39. Defendant Frank L. Snapp and Elmer G. Snapp d/b/a H.T. Snapp & Sons is a partnership established under the laws of the Commonwealth of Virginia and is engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. Through its officers, agents and employees it submitted a clearance order with the Virginia Employment Commission, part of the FESS, on or about April 28, 1978 containing a job offer for fourteen (14) unskilled agricultural laborers to work the 1978 apple harvest.

40. Defendant Elmer G. Snapp is a partner of defendant H.T. Snapp & Sons and as such is responsible for the filing of the clearance order with the Virginia Employment Commission on or about April 28, 1978.

41. Defendant Frank L. Snapp is a partner of defendant H.T. Snapp & Sons and as such is responsible for the filing of the clearance order with the Virginia Employment Commission on or about April 28, 1978.

42. Defendant R. Roland Snapp is a sole proprietor engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. On or about April 28, 1978 defendant Snapp filed a clearance order with the Virginia Employment Commission, part of the FESS, containing a job offer for ten (10) unskilled agricultural laborers to work the 1978 apple harvest.

43. Defendant Robert E. Wyatt is a sole proprietor engaged in the business of growing, harvesting and marketing apples at orchards located at or near Berryville, Virginia. On or about April 28, 1978 defendant Wyatt filed a clearance order with the Virginia Employment Commission, part of the FESS, containing a job offer for fifteen (15) unskilled agricultural employees to work the 1978 apple harvest.

44. Defendant Stanley Bauserman is a sole proprietor engaged in the business of growing, harvesting and marketing apples at orchards located at or near Stephens City, Virginia. On or about April 28, 1978 defendant Bauserman filed a clearance order with the Virginia Employment Commission, part of the FESS, containing a job offer for eight (8) unskilled agricultural laborers to work the 1978 apple harvest.

45. Defendant Stewart Bell is a sole proprietor engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. On or about April 28, 1978 defendant Bell filed a clearance order with the Virginia Employment Commission, part of the FESS, containing a job offer for twelve (12) unskilled agricultural laborers to work the 1978 apple harvest.

46. Defendant Henry Brumback is a sole proprietor engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. On or about April 28, 1978 defendant Brumback filed a clearance order with the Virginia Employment Commission, part of the FESS, containing a job offer for forty-two (42) unskilled agricultural laborers to work the 1978 apple harvest.

47. Defendant Woodside Farm is a business entity established under the laws of the Commonwealth of Virginia and is engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. Through its officers, agents and employees it filed a clearance order with the Vir-

ginia Employment Commission, part of the FESS, on or about April 28, 1978 containing a job offer for twelve (12) unskilled agricultural laborers to work the 1978 apple harvest.

48. Defendant John W. Smith is manager of defendant Woodside Farm and as such is responsible for the filing of the clearance order with the Virginia Employment Commission on or about April 28, 1978.

49. Defendant William S. Franklin is a sole proprietor engaged in the business of growing, marketing and harvesting apples at orchards located at or near Berryville, Virginia. On or about April 28, 1978 defendant Franklin filed a clearance order with the Virginia Employment Commission, part of the FESS, containing a job offer for nine (9) unskilled agricultural laborers to work the 1978 apple harvest.

50. Defendant Wayne McInturff is a sole proprietor engaged in the business of growing, harvesting and marketing apples at the orchards located at or near Gore, Virginia. On or about April 28, 1978 defendant McInturff filed a clearance order with the Virginia Employment Commission, part of the FESS, containing a job offer for six (6) unskilled agricultural laborers to work the 1978 apple harvest.

51. Defendant James B. Swing is a sole proprietor engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. On or about April 28, 1978 defendant Swing filed a clearance order with the Virginia Employment Commission, part of the FESS, containing a job offer for fourteen (14) unskilled agricultural laborers to work the 1978 apple harvest.

52. Defendant George Cather is a sole proprietor engaged in the business of growing, harvesting and marketing apples at orchards located at or near Clearbrook, Virginia. On or about April 28, 1978 defendant Cather

filed a clearance order with the Virginia Employment Commission, part of the FESS, containing a job offer for ten (10) unskilled agricultural laborers to work the 1978 apple harvest.

53. Defendant Irvin King is a sole proprietor engaged in the business of growing, harvesting and marketing apples at orchards located in Clarke County, Virginia and Jefferson County, West Virginia. On or about April 28, 1978 defendant King filed a clearance order with the Virginia Employment Commission, part of the FESS, containing a job offer for twenty-seven (27) unskilled agricultural laborers to work the 1978 apple harvest.

54. Defendant Albert W. Messick is a sole proprietor engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. On or about April 28, 1978 defendant Messick filed a clearance order with the Virginia Employment Commission, part of the FESS, containing a job offer for twelve (12) unskilled agricultural laborers to work the 1978 apple harvest.

55. Defendant C.H. Jones Orchards is a sole proprietor engaged in the business of growing, harvesting and marketing apples at orchards located at or near Winchester, Virginia. On or about April 28, 1978 defendant Harry Rinher, manager of defendant C.H. Jones Orchards filed a clearance order with the Virginia Employment Commission, part of the FESS, containing a job offer for fourteen (14) unskilled agricultural laborers to work the 1978 apple harvest.

BACKGROUND

56. The Wagner-Peyser Act of 1933, 29 U.S.C. §§ 49 *et seq.*, established a federal-state system of employment agencies to recruit domestic workers. Pursuant to the Act, applications for workers to fill agricultural positions may be filed by employers with state employment serv-

ice agencies which process applications for workers. If workers are not available locally or within the state to fulfill the need, a so-called clearance order is sent through the interstate facilities of the Employment and Training Administration of the United States Department of Labor to other state employment agencies which may be able to fill the request.

57. The Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*, regulates the admission of non-immigrant aliens into the United States. Non-immigrants may be admitted by the Attorney General to perform temporary services of labor if unemployed persons capable of performing such work cannot be found in the United States. Upon a visa petition by an employer desiring to import alien labor, the Attorney General is directed by the Act to consult with appropriate agencies of the Government. In implementation of the Attorney General's responsibilities under the Act, regulations issued by the Immigration and Naturalization Service require that an employer seeking to obtain non-immigrant visas for aliens to perform temporary labor must obtain from the Secretary of Labor a certification stating that qualified persons in the United States are not available and that employment of alien labor will not adversely affect the wages and working conditions of similarly employed workers in the United States. 8 C.F.R. § 214.2(h)(3).

58. The Secretary of Labor has issued regulations which set forth requirements and procedures applicable to requests for certification by employers seeking the services of temporary foreign workers. 20 C.F.R. Part 655, 43 Fed. Reg. 10312 *et seq.* (March 10, 1978). An employer who desires to use foreign workers for temporary agricultural employment must file a temporary labor certification application including a job offer for U.S. workers with a local office of a state employment service agency. 20 C.F.R. § 655.200(a), 43 Fed. Reg. 10313 (March 10, 1978). The Secretary's regulations

require that job offers to U.S. workers must offer at least the same benefits which the employer is offering, intends to offer or will afford, to temporary foreign workers. Similarly, no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's foreign workers. 20 C.F.R. § 655.202, 43 Fed. Reg. at 10314. Further, the Secretary's regulations require that the employer filing a temporary labor certificate application shall include certain assurances, signed by the employer, including an assurance that the employer will cooperate with the employment service system in the active recruitment of U.S. workers until any foreign workers, for whom certification is subsequently granted, have departed for the employer's place of employment. 20 C.F.R. § 655.203(d), 43 Fed. Reg. at 10316. The Secretary's regulations also require an assurance by an employer seeking certification for temporary foreign workers that from the time the foreign workers depart for the employer's place of employment the employer will provide employment to any qualified U.S. worker who applies to the employer until fifty (50) percent of the period of work contract, under which the foreign worker who is in the job was hired, has elapsed. 20 C.F.R. § 655.203(e), 43 Fed. Reg. at 10316.

59. The Secretary of Labor has issued regulations under the authority of the Wagner-Peyser Act, which set forth the terms and conditions with which employers must comply if they wish to avail themselves of the services of the United States Employment Service. These regulations require that every job offer for U.S. workers, regardless of whether the employer seeks certification of foreign labor, must guarantee certain minimal benefits, wages, and working conditions, among which are the following:

> Job offers which provide for a minimum standard of housing, 20 C.F.R. § 655.202(b)(1);

Job offers which provide for furnishing all tools, supplies, and equipment to the worker without cost to the worker, 20 C.F.R. § 655.202(b)(3);

A guarantee to the worker of employment for at least three quarters of the work days of the total period for which the employment contract is in effect, 20 C.F.R. § 655.202(b)(6)(i);

Job offers which guarantee that only certain deductions from wages will be made, 20 C.F.R. § 655.202(b)(13);

A requirement that the employer keep accurate and adequate records with regard to all earnings and hours of employment, and that statements containing this information be furnished to the worker at the time he is paid, 20 C.F.R. § 655.202(b)(7)(8);

The job offer must guarantee the payment of not less than the prevalent adverse effect wage rate, 20 C.F.R. § 655.202(b)(9)(i); and

Piece rates must be designed to produce hourly earnings at least equivalent to the hourly adverse effect wage rate, 20 C.F.R. § 655.202(b)(9)(ii).

43 Fed. Reg. 10314, 10316.

FACTUAL ALLEGATIONS

60. Each year thousands of temporary farm workers are required by United States east coast apple growers to harvest apples during September and October. Many apple growers have traditionally sought to employ Jamaican workers for this purpose.

61. The Commonwealth Labor Department, through its agency the Puerto Rico Employment Service, is authorized to cooperate in the Federal Employment Service System (FESS) established under the Wagner-Peyser Act. In an effort to reduce unemployment, an attempt

was made by the Commonwealth Labor Department in 1976 to place domestic Puerto Rican workers in jobs with east coast apple growers. Despite an agreement with east coast growers to place 1,000 workers in such positions, only 613 Puerto Rican workers were actually hired by the apple growers and many were dismissed for alleged unproductivity. During 1977, only 93 workers were referred to the mainland to work the apple harvest and many of these workers were also dismissed for alleged unproductivity.

62. Apple growers in New York, Maryland, Virginia and West Virginia during 1978 took advantage of opportunities for securing seasonal labor provided by the interstate clearance system established by the Wagner-Peyser Act.

63. In consequence of the growers' decision to utilize the interstate clearance system, job offers were cleared to the Puerto Rico Employment Service on August 2, 1978. By the close of the 60-day "availability" test period on or about August 14, 1978, after less than two weeks of recruitment in Puerto Rico, the Commonwealth Department of Labor had recruited 1,094 Puerto Rican workers who were referred to regional offices of the United States Employment and Training Administration against specific growers' job orders.

64. The total number of workers called for in the job orders transmitted to Puerto Rico was 2,318; and, subsequent to August 15, 1978, the Commonwealth recruited additional workers so as to bring the total recruited to 2,318. Of this total number of 2,318 Puerto Rican workers, only 992 actually arrived on the mainland. The remainder never left Puerto Rico because of oral advice from the United States Department of Labor requesting cancellation of remaining flights because many of the defendant growers had refused to employ Puerto Rican workers who had already arrived. Of the 992 workers

who arrived at the orchards, 420 came to Virginia orchards. Of these 420 workers, fewer than 30 had employment three weeks later, the growers having refused to employ most of these workers and having dismissed most of the rest within a brief time for alleged unproductivity.

65. Upon recruitment of Puerto Rican workers, names and social security numbers were sent by telegram to the Regional Office of the United States Department of Labor for the region from which the order against which workers were being transferred had been sent. By telegrams dated August 12 through August 30, 1978 from Leandro Pena, Director, Commonwealth Bureau of Employment Security to J. Terrell Whitsitt, Regional Administrator Employment and Training Administration, United States Department of Labor, Philadelphia, the Regional Administrator was advised of the names and social security numbers of forty (40) Puerto Rican workers who had made a firm commitment to work for defendant *Alfred L. Snapp & Sons, Inc.*, fifteen (15) Puerto Rican workers who had made a firm commitment to work for defendant *John T. Watt and Son*, doing business as *Timber Ridge Fruit Farm*, thirty-three (33) Puerto Rican workers who had made a firm commitment to work for defendant *Orchard Management, Inc.*, seventy (70) Puerto Rican workers who had made a firm commitment to work for defendant *D.K. Russell and Sons, Inc.*, thirteen (13) Puerto Rican workers who had made a firm commitment to work for defendant *Whitman Orchards*, nineteen (19) Puerto Rican workers who had made a firm commitment to work for defendant *Robert Boyd T/A Cloverdale Farm*, sixty (60) Puerto Rican workers who had made a firm commitment to work for defendant *The C.L. Robinson Corp.*, seventy-two (72) Puerto Rican workers who had made a firm commitment to work for defendant *R&T Packing Co.*, thirty-five (35) Puerto Rican workers who had made a firm commitment to work for defendant *E. Blackburn Moore*, one hundred

and four (104) Puerto Rican workers who had made a firm commitment to work for defendant *Fred L. Glaize and Philip B. Glaize, doing business as Crescent Orchards*, six (6) Puerto Rican workers who had made a firm commitment to work for defendant *Frederick Farms*, twenty (20) Puerto Rican workers who had made a firm commitment to work for defendant *George B. Whitacre*, forty-eight (48) Puerto Rican workers who had made a firm commitment to work for defendant *H.F. & T.B. Byrd*, six (6) Puerto Rican workers who had made a firm commitment to work for defendant *Harvey Brumback*, forty (40) Puerto Rican workers who had made a firm commitment to work for defendant *James Clevenger*, sixteen (16) Puerto Rican workers who had made a firm commitment to work for defendant *McDonald Farms*, twenty-two (22) Puerto Rican workers who had made a firm commitment to work for defendant *Messick & Beaver*, fourteen (14) Puerto Rican workers who had made a firm commitment to work for defendant *H.T. Snapp & Son*, ten (10) Puerto Rican workers who had made a firm commitment to work for defendant *R. Roland Snapp*, fourteen (14) Puerto Rican workers who had made a firm commitment to work for defendant *Robert E. Wyatt*, seven (7) Puerto Rican workers who had made a firm commitment to work for defendant *Stanley Bauserman*, eleven (11) Puerto Rican workers who had made a firm commitment to work for defendant *Stewart Bell*, six (6) Puerto Rican workers who had made a firm commitment to work for defendant *Harvey Brumback, Woodbine Farm*, twelve (12) Puerto Rican workers who had made a firm commitment to work for defendant *Woodside Farm*, seven (7) Puerto Rican workers who had made a firm commitment to work for defendant *William S. Franklin*, six (6) Puerto Rican workers who had made a firm commitment to work for defendant *Wayne McInturff*, fourteen (14) Puerto Rican workers who had made a firm commitment to work for defendant *James B. Swing*, four (4) Puerto

Rican workers who had made a firm commitment to work for defendant *George Cather*, ten (10) Puerto Rican workers who had made a firm commitment to work for defendant *Garland R. Cather, Westview Farm*, twenty-seven (27) Puerto Rican workers who had made a firm commitment to work for defendant *Irvin R. King, Drilake Farm*, twelve (12) Puerto Rican workers who had made a firm commitment to work for defendant *Albert W. Messick*, and fourteen (14) Puerto Rican workers who had made a firm commitment to work for defendant *C.H. Jones Orchards.*

66. Enrique Gonzalez Fontanez, and other migrant Puerto Rican farm workers accepted employment from defendant *Orchard Management Co.* and defendant *Harry F. Byrd, III*, its president, pursuant to the terms of the job order filed on behalf of said defendants with the Virginia Employment Commission, on or about April 28, 1978. The aforesaid migrant workers were instructed to depart from San Juan Airport to be available to commence work on September 5, 1978; Jose Acosta and other migrant Puerto Rican farm workers accepted employment from defendant *Robert Boyd T/A Cloverdale Farm* and *Robert J. Boyd*, its president-treasurer, pursuant to the terms of the clearance order filed on behalf of said defendants with the Virginia Employment Commission on or about April 28, 1978. The aforesaid migrant workers were instructed to depart from San Juan Airport to be available to commence work on September 5, 1978; Ramon Velazquez Velazquez and other migrant Puerto Rican workers accepted employment from defendant *The C.L. Robinson Corp.*, and defendant *Delmar Robinson, Jr.*, its president, pursuant to the terms of the clearance order filed on behalf of said defendants with the Virginia Employment Commission. The aforesaid migrant workers were instructed to depart from San Juan Airport to be available to commence work on September 5. 1978; Jesus Rivera and other migrant Puerto Rican farm workers ac-

cepted employment from defendant *R&T Packing Corp.*, and *C. Robert Solenberger*, its president, pursuant to the terms of the clearance order filed on behalf of said defendants with the Virginia Employment Commission on or about April 28, 1978. The aforesaid migrant workers were instructed to depart from San Juan Airport to be available to commence work on September 5, 1978; Jorge E. Mera Rivera and other migrant Puerto Rican farm workers accepted employment from defendant *George B. Whitacre*, pursuant to the terms of the job order filed on behalf of said defendant with the Virginia Employment Commission on or about April 28, 1978. The aforesaid migrant workers were instructed to depart from San Juan Airport to be available to commence work on September 5, 1978; Jorge L. Aponte Ortiz and other migrant Puerto Rican farm workers accepted employment from defendant *R. Roland Snapp* pursuant to the terms of the clearance order filed on behalf of said defendant with the Virginia Employment Commission on or about April 28, 1978. The aforesaid migrant workers were instructed to depart from the San Juan Airport to be available to commence work on September 5, 1978. Angel L. Ramirez Pellot and other migrant Puerto Rican farm workers accepted employment from defendant *Wayne McInturff* pursuant to the terms of the clearance order filed on behalf of said defendant with the Virginia Employment Commission on or about April 28, 1978. The aforesaid migrant workers were instructed to depart from the San Juan Airport to be available to commence work on September 5, 1978; Rene Troche Torres and other migrant Puerto Rican farm workers accepted employment from defendant *James B. Swing* pursuant to the terms of the clearance order filed on behalf of said defendant with the Virginia Employment Commission on or about April 28, 1978. The aforesaid migrant workers were instructed to depart from the San Juan Airport to be available to commence work on September 5, 1978; Eduardo Rivera Arroyo and other migrant Puerto Rican farm workers ac-

cepted employment from defendant *George Cather* pursuant to the terms of the clearance order filed on behalf of said defendant with the Virginia Employment Commission on or about April 28, 1978. The aforesaid migrant workers were instructed to depart from the San Juan Airport to be available to commence work on September 5, 1978; and Juan de Jesus and other migrant Puerto Rican farm workers accepted employment from defendant *C.H. Jones Orchards* pursuant to the terms of the clearance order filed on behalf of said defendant with the Virginia Employment Commission on or about April 28, 1978. The aforesaid migrant workers were instructed to depart from the San Juan Airport to be available to commence work on September 5, 1978. As to all of the aforementioned Puerto Rican migrant workers, their departure for the mainland United States was cancelled upon oral advice by the Office of the Solicitor, United States Department of Labor, to plaintiff Quiros that certain growers had refused to employ individuals recruited by the Puerto Rican Employment Service and referred from Puerto Rico. Accordingly, these migrant workers never arrived at their intended places of employment and were not permitted to work in accordance with the terms of the clearance orders containing job offers they had accepted.

67. Miguel A. Castro and other migrant Puerto Rican farm workers presented themselves for employment at the orchard of defendants *Orchard Management Co.* and *Harry F. Byrd, III*, its president, but were denied employment. Edwin Oquendo Ortega and other migrant Puerto Rican farm workers presented themselves for employment at the orchard of defendants *D.K. Russell and Sons* and *J. Robert Russell*, its president, but were denied employment. Jose Rodriquez Olan and other migrant Puerto Rican farm workers presented themselves for employment at the orchard of defendants *John T. Watt & Son, d/b/a Timber Ridge Fruit Farm*, and *John T. Watt, Jr.*, its manager, but were denied employment. Edwin Acevedo Caro and other migrant Puerto Rican farm workers pre-

sented themselves for employment at the orchard of defendants *Fred L. and Philip B. Glaize d/b/a Crescent Orchards, Frederick L. Glaize, Jr.*, and *Philip B. Glaize*, but were denied employment. Miquel Laboy Colon and other migrant Puerto Rican farm workers presented themselves for employment at the orchard of defendant *Messick & Beaver*, but were denied employment. Mario Tirado Melendez and other migrant Puerto Rican farm workers presented themselves for employment at the orchard of defendant *E. Blackburn Moore*, but were denied employment. Jesus M. Pinto Rodriquez and other migrant Puerto Rican farm workers presented themselves for employment at the orchard of defendants *Alfred L. Snapp & Son, Inc.* and *Alfred L. Snapp, Sr.*, its chief officer, but were denied employment. Antonio Justiniano Irizarry and other migrant Puerto Rican farm workers presented themselves for employment at the orchard of defendant *Woodside Farm*, but were denied employment.

68. Pursuant to the terms of the clearance orders filed with the Virginia Employment Commission on behalf of defendants enumerated in paragraphs 5-55 above, as applicable, Jesus M. Pinto Rodriguez and other migrant Puerto Rican farm workers accepted employment from defendant *Alfred L. Snapp & Son, Inc.* and defendant *Alfred L. Snapp, Sr.*, its chief officer, Angel Luis Perez Irizarry and other migrant Puerto Rican farm workers accepted employment from defendant *John T. Watt & Son, d/b/a Timber Ridge Fruit Farm*, and defendant *John T. Watt, Jr.*, its manager; Catalino Lopez and other migrant Puerto Rican farm workers accepted employment from defendant *Orchard Management Co., Inc.* and defendant *Harry F. Byrd, III*, its president; Miguel Agosto Bonilla and other migrant Puerto Rican farm workers accepted employment from defendant *D.K. Russell and Sons, Inc.* and defendant *Robert Russell*, its president; Juan Velazquez and other migrant Puerto Rican farm workers accepted employment from defendant *Whitman Orchards*

and defendant *Gordon T. Whitman*, its president; Mario Tirado Melendez, and other migrant Puerto Rican farm workers accepted employment from defendant *E. Blackburn Moore*; Edwin Acevedo Caro and other migrant Puerto Rican farm workers accepted employment from defendant *Fred L. and Philip B. Glaize*, doing business as *Crescent Orchards* and defendants *Fred L. Glaize, Jr.* and *Philip B. Glaize*; Carlos M. Lopez Arroyo and other migrant Puerto Rican farm workers accepted employment from defendant *Frederick Farms* and defendant *James R. Robinson*, its manager; Ramon Ramirez Vera and other migrant Puerto Rican farm workers accepted employment from defendants *H.F. & T.B. Byrd, John E. Crumpacker*, its manager; and defendants *H.F. Byrd* and *T.B. Byrd*; Jesus Cuevas Figueroa and other migrant Puerto Rican farm workers accepted employment from defendant *Harvey Brumback*; Wilfredo Lugo Sabater and other migrant Puerto Rican farm workers accepted employment from defendant *James Clevenger*; Javier Mendez Vazquez and other migrant Puerto Rican farm workers accepted employment from defendant *McDonald Farms*; Miguel Laboy Colon and other migrant Puerto Rican farm workers accepted employment from defendant *Messick & Beaver*; Hector Rivera and other migrant Puerto Rican farm workers accepted employment from defendant *Frank L. Snapp and Elmer G. Snapp* doing business as *H.T. Snapp & Son* and defendants *Frank L. Snapp* and *Elmer G. Snapp*; Julio Medina Concepcion and other migrant Puerto Rican farm workers accepted employment from defendant *R. Roland Snapp*; Emilio Rodriquez Ortiz and other migrant Puerto Rican farm workers accepted employment from defendant *Robert E. Wyatt*; Angel M. Figueroa and other migrant Puerto Rican farm workers accepted employment from defendant *Stanley Bauserman*; Manual A. Perez Calderon and other migrant Puerto Rican farm workers accepted employment from defendant *Stewart Bell*; Juan Mariani Ortiz and other migrant Puerto Rican farm workers accepted employment from defendant *Har-*

vey Brumback, Woodbine Farm; Antonio Justiniano Irizarry and other migrant Puerto Rican farm workers accepted employment from defendant *Woodside Farm*; Efrain Cortes Concepcion and other migrant Puerto Rican farm workers accepted employment from *William S. Franklin*; Luis Alvarez Ortiz and other migrant Puerto Rican farm workers accepted employment from defendant *Wayne McInturff*; Rene Troche Torres and other migrant Puerto Rican farm workers accepted employment from defendant *James B. Swing*; Eduardo Rivera Arroyo and other migrant Puerto Rican farm workers accepted employment from defendant *George Cather*; Antonio Concepcion and other migrant Puerto Rican farm workers accepted employment from defendant *Garland R. Cather, Westview Farm*; Marcial Gonzalez Vazquez and other migrant Puerto Rican farm workers accepted employment from defendant *Irvin R. King Drilake Farm*; Celio Perez Matias and other migrant Puerto Rican farm workers accepted employment from defendant *Albert W. Messick*; and Juan de Jesus Lebron and other migrant Puerto Rican farm workers accepted employment from defendant *C.H. Jones Orchard.*

69. The employment of the aforementioned United States migrant farm workers and others at the orchards of the defendants identified in paragraph 68 above was improperly terminated prior to expiration of the contract period, and their work contracts cancelled by such defendants herein, for no stated reason, or on one or more of the following pretexts invoked by defendants herein: (a) allegedly no work available; (b) alleged inability to pick sufficient quantities of apples; (c) allegedly picked damaged fruit; (d) allegedly no social security card.

70. In addition, during the duration of their employment at the orchards of defendants herein, the aforementioned United States migrant farm workers and others were subjected by defendants and their agents and employees to one or more of the following work conditions, where Jamaicans were not subjected to such conditions:

a. Inadequate or no training;

b. Poor or unsanitary camp conditions;

c. Inadequate food;

d. Hired to pick apples but instructed to pick pears or other items (*e.g.*, peaches, weeds), or instructed to perform other types of work (*e.g.*, packing);

e. Required to pick apples that were noticeably smaller than apples Jamaicans were allowed to pick (thus, requiring longer time to fill bin);

f. Required to spot-pick after Jamaicans had been permitted to strip-pick;

g. Required to pick from top of tree after Jamaicans permitted to pick at bottom of tree;

h. Inadequate medical facilities and treatment;

i. Not fully paid for work performed;

j. Jamaicans permitted to start work at an earlier hour than Puerto Ricans;

k. Jamaicans permitted to work on Saturday and/or Sunday and Puerto Ricans were not;

l. Required to work on Sunday when did not want to for religious reasons;

m. Not given as many boxes to fill as Jamaicans;

n. Not given any, or sufficient number of, numbered stickers needed to affix to boxes after apples picked, in order to identify work product;

o. Required to fill a bin that belonged to a Jamaican; and

p. Subjected to verbal abuse or threatened to be fired.

COUNT ONE

71. Plaintiff realleges and incorporates herein by reference each and every allegation in paragraphs 1 through 67 of this complaint.

72. By failing to provide employment to qualified Puerto Rican migrant farm workers, including those workers identified in paragraphs 66 and 67 above and others, who applied for employment before expiration of fifty percent of the period of the work contract for which temporary foreign workers were hired, defendants Orchard Management Co., Harry F. Byrd, III, Robert Boyd T/A Cloverdale Farm, Robert J. Boyd, The C. L. Robinson Corp., Delmar Robinson, Jr., R&T Packing Corp., C. Robert Solenberger, George B. Whitacre, R. Roland Snapp, Wayne McInturff, James B. Swing, George Cather, C.H. Jones Orchards, D.K. Russell and Sons, J. Robert Russell, John T. Watt & Son d/b/a Timber Ridge Fruit Farm, John T. Watt, Frederick L. and Philip B. Glaize d/b/a Crescent Orchards, Frederick L. Glaize, Jr., Philip B. Glaize, Messick & Beaver, E. Blackburn Moore, Alfred L. Snapp & Son, Inc., Alfred L. Snapp, Woodside Farm and John W. Smith, and their officers, agents and employees, as applicable, have violated the Wagner-Peyser Act, 29 U.S.C. §§ 49 *et seq.*, the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §§ 1101 *et seq.*, Labor Certification Process Regulations promulgated at 20 C.F.R., Chapter V, Part 655, and Wagner-Peyser Act regulations at 20 C.F.R. Part 655.

COUNT TWO

73. Plaintiff realleges and incorporates herein by reference each and every allegation in paragraphs 1 through 65 and 68 through 70 above.

74. By subjecting Puerto Rican migrant farm workers, including those workers identified in paragraph 68 above and others, to work conditions more burdensome than conditions established for temporary foreign workers, defendants Alfred L. Snapp & Son, Inc., Alfred L. Snapp, Sr., John T. Watt & Son d/b/a Timber Ridge Fruit Farm, John T. Watt, Jr., Orchard Management

Co., Inc., Harry F. Byrd, III, D.K. Russell and Sons, Inc., Robert Russell, Whitman Orchards, Gordon T. Whitman, E. Blackburn Moore, Fred L. and Philip B. Glaize d/b/a Crescent Orchards, Frederick L. Glaize, Jr., Philip B. Glaize, Frederick Farms, James R. Robinson, H.F. & T.B. Byrd, John E. Crumpacker, H.F. Byrd, T.B. Byrd, Harvey Brumback, James Clevenger, McDonald Farms, Messick & Beaver, Frank L. Snapp and Elmer G. Snapp d/b/a H.T. Snapp, Elmer G. Snapp, Frank L. Snapp, R. Roland Snapp, Robert E. Wyatt, Stanley Bauserman, Stewart Bell, Harvey Brumback, Woodbine Farm, Woodside Farm, John W. Smith, William S. Franklin, Wayne McInturff, James B. Swing, George Cather, Garland R. Cather, Westview Farm, Irving R. King, Drilake, Albert W. Messick and C.H. Jones Orchards and their officers, agents and employees, as applicable, have violated the Wagner-Peyser Act, 29 U.S.C. §§ 49 *et seq.*, Labor Certification Process Regulations promulgated at 20 C.F.R. Chapter V, Part 655, and Wagner-Peyser Act regulations at 20 C.F.R. Part 655.

COUNT THREE

75. Plaintiff realleges and incorporates herein by reference each and every allegation in paragraphs 1 through 65 and 68 through 70 above.

76. By improperly terminating employment of Puerto Rican migrant farm workers, including those workers identified in paragraph 65 above and others, before expiration of their contracts, defendants Alfred L. Snapp & Son, Inc., Alfred L. Snapp, Sr., John T. Watt & Son d/b/a Timber Ridge Fruit Farm, John T. Watt, Jr., Orchard Management Co., Inc., Harry F. Byrd, III, D.K. Russell and Sons, Inc., Robert Russell, Whitman Orchards, Gordon T. Whitman, E. Blackburn Moore, Fred L. and Philip B. Glaize d/b/a Crescent Orchards, Frederick L. Glaize, Jr., Philip B. Glaize, Frederick Farms, James R. Robinson, H.F. & T.B. Byrd, John E.

Crumpacker, H.F. Byrd, T.B. Byrd, Harvey Brumback, James Clevenger, McDonald Farms, Messick & Beaver, Frank L. Snapp and Elmer G. Snapp d/b/a H.T. Snapp, Elmer G. Snapp, Frank L. Snapp, R. Roland Snapp, Robert E. Wyatt, Stanley Bauserman, Stewart Bell, Harvey Brumback, Woodbine Farm, Woodside Farm, John W. Smith, William S. Franklin, Wayne McInturff, James B. Swing, George Cather, Garland R. Carter, Westview Farm, Irvin B. King, Drilake Farm, Albert W. Messick, and C.H. Jones Orchards and their officers, agents and employees, as applicable, have breached the terms of the contracts with such workers by failing to offer employment for at least three-fourths of the workdays of the total period during which the work contract was in effect in violation of the Wagner-Peyser Act, 29 U.S.C. §§ 49 *et seq.*, the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §§ 1101 *et seq.*, Labor Certification Process Regulations promulgated at 20 C.F.R. Chapter V, Part 655, and Wagner-Peyser Act regulations at 20 C.F.R. Part 655.

IRREPARABLE INJURY

77. In order to promote opportunities for profitable employment for Puerto Rican laborers and to reduce unemployment in the Commonwealth of Puerto Rico, plaintiff desires to recruit and refer migrant Puerto Rican farm workers agaist orders placed by defendants with the Virginia Employment Commission, part of the FESS, in 1979 and succeeding years. By their actions in improperly terminating migrant Puerto Rican farm workers, in discriminating against such workers in the terms of their employment, and in refusing to offer employment to such workers, defendants deprive the Commonwealth of Puerto Rico of its right to effectively participate in the benfits of the Federal Employment Service System of which it is a part and to serve as a supplier state for migrant farm workers in connection with a major crop. Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court:

1. Adjudge and declare that the failure by defendants identified in paragraphs 66 and 67 above and their officers, agents and employees, as applicable, to provide employment to named migrant Puerto Rican farm workers and others constitutes a violation of the Wagner-Peyser Act, 29 U.S.C. §§ 49 *et seq.*, the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §§ 1101 *et seq.*, Labor Certification Process Regulations promulgated by the Secretary of Labor at 20 C.F.R. Chapter V, Part 655, and Wagner-Peyser Act regulations at 20 C.F.R. Part 655.

2. Adjudge and declare that those defendants identified in paragraph 68 above and their officers, agents and employees, as applicable, by subjecting named Puerto Rican migrant farm workers and others to work conditions more burdensome than conditions established for temporary foreign workers, have violated the Wagner-Peyser Act, 29 U.S.C. §§ 49, *et seq.*, Labor Certification Process Regulations promulgated at 20 C.F.R. Chapter V, Part 655, and Wagner-Peyser Act regulations at 20 C.F.R. Part 655.

3. Adjudge and declare that the improper termination of employment of named migrant Puerto Rican farm workers and others as set forth in paragraph 69 above, by defendants identified in paragraph 68 above, and their officers, agents and employees, as applicable, constitutes a violation of the Wagner-Peyser Act, 29 U.S.C. §§ 49 *et seq.*, the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §§ 1101 *et seq.*, the Labor Certification Process Regulations promulgated by the Secretary of Labor at 20 C.F.R., Chapter V, Part 655, and the Wagner-Peyser Act regulations at 20 C.F.R. Part 655, and that such defendants have breached the terms of their contracts with named migrant Puerto Rican farm workers.

4. Permanently enjoin the defendants and their officers, agents, employees, assigns, successors in interest, and all persons acting or claiming to act in their behalf or interests from violations of the Wagner-Peyser Act, 29 U.S.C. §§ 49 *et seq.*, the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §§ 1101 *et seq.*, Labor Certification Process Regulations promulgated by the Secretary of Labor at 20 C.F.R., Chapter V, Part 655, and the Wagner-Peyser Act regulations at 20 C.F.R. Part 655.

5. Award plaintiff its costs and disbursements incurred herein, including reasonable attorney's fees, and

6. Grant plaintiff such further relief as may to the Court appear just and equitable.

Respectfully submitted,

LUIS GUINOT, JR.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX A

(Substitute for
H.B. 457)

(No. 54)

(Approved July 13, 1978)

AN ACT

To amend Section 3 of Act No. 87 of June 22, 1962 as amended, to grant the Secretary of Labor,[1] discretional authority to exempt employers from the duties established in said Section 3, when the recruitment of workers is done through the Interstate System of the United States Employment Service; to include the provisions regarding the contracting of workers to work outside of Puerto Rico in a new Section 4; to grant the Secretary of Labor [1] discretional authority to offer technical and legal help to the laborers, in the proper forums, and to renumber Sections 4 to 11 of the Act.

STATEMENT OF MOTIVES

In order to make best use of the working opportunities, which have been traditionally provided, thousands of workers migrate to the United States to work in the growing and harvesting of agricultural crops.

Act No. 87 of June 22, 1962 as amended, as well as the predecessor, Act No. 89 of March, 1947, was conceived as an instrument for the protection of farmworkers against discrimininatory or abusive treatment by unscrupulous employers. The mechanisms provided by said Act, were designed to channel the needs and aspirations of the workers to take maximum advantage of available

[1] Was changed to Secretary of Labor and Human Resources by Act No. 100 of 1977.

job opportunities and at the same time guarantee fair and just working conditions.

According to the provisions of this Act, the employers who wish to hire workers to work outside Puerto Rico, shall execute a written contract with the persons to be employed. Such contract shall be approved by the Secretary of Labor and Human Resources, who is committed to protect the rights of the workers, under the terms of said contract, and pursuant to the basic standards established by the Secretary of Labor through Regulations.

The provisions of the Wagner-Peyser Act, approved by Congress on June 6, 1933, which apply to Puerto Rico, created a national employment system and established procedures for the recruitment and contracting of available workers in other states, through job orders for the recruitment of workers through the appropriate state agencies affiliated to the system, including Puerto Rico. The workers recruited through said system, are protected by a series of standards providing minimum working, safety and housing conditions. Pursuant to the abovementioned act, and in coordination with the rulings of the federal immigration act (The Immigration and Naturalization Act), the temporary use of foreign workers in agricultural work is permitted, after certification by the United States Secretary of Labor that domestic workers are not available.

During the past years, a substantial number of employers who traditionally recruited workers in Puerto Rico, have decided, and, as a matter of fact, have preferred to hire foreign workers instead of Puerto Ricans, alleging that the requirements and conditions established in Act No. 87 and the Regulations promulgated thereunder, have become too onerous and costly and are contrary to the provisions of the Wagner-Peyser Act.

The "availability" of Puerto Rican workers in view of the above-mentioned reasons has been questioned before the Courts. The employers' contention is shared and has been supported and sustained by the United States Secre-

tary of Labor who has certified the non-availability of Puerto Rican workers in favor of other foreign workers.

As a result of this, there has been a significant decrease in the number of migrant workers contracted. In the course of the last ten years, the number of workers hired in United States farms has dropped progressively and alarmingly. In 1967, 21,654 workers were employed in the farms, but at the end of 1977 only 4,284 workers were employed which reveals a net loss of 17,370 jobs.

At present, there is a great mass of potential workers available and willing to obtain lucrative employment. In view of this situation, it is important for reasons of public policy, to seek a solution that will allow adequate channeling of the aspirations and needs of these persons to obtain a job, without needlessly harming the workers' interest in obtaining the maximum protection available.

For this reason, it is necessary to amend Act No. 87 of June 22, 1962 as amended, so that, when migrant workers are recruited through the Interstate System of the United States Employment Service, the Secretary of Labor of the United States at his discretion, and after exhausting all available resources to negotiate a contract pursuant to the provisions of Act No. 87 and its Regulations, may relieve the employers from complying with said obligation, provided the minimum guarantees established in the federal regulations are provided, and that in every case, the Secretary of Labor shall retain supervisory authority to guarantee full compliance with the working conditions stipulated in the job offer.

It is the intention of this Act to introduce more flexibility to Act No. 87, granting the Secretary of Labor a certain degree of discretion to set aside the compliance with the provisions of the Act, when, after exhausting all efforts to negotiate a contract under said Act, they are unsuccessful, and as a result, in the judgment of the Secretary, the worker's interest in obtaining lucrative employment is adversely affected.

BE IT ENACTED BY THE LEGISLATURE OF PUERTO RICO:

Section 1.—Section 3 of Act 87 of June 22, 1962 as as amended, is hereby amended to read as follows:

> "Every person, organization, or agent domiciled in or outside of Puerto Rico, who wishes to contract the services of workers in Puerto Rico to work outside of the Commonwealth, shall execute a written contract with the persons to be employed, which shall contain the minimum guarantees fixed by the Secretary of Labor [1] through Regulations, and upon its approval, the Secretary shall be committed to protect the workers' rights pursuant to the terms thereof, providing, that when the recruitment of migrant workers is performed through the Interstate System of the United States Employment Service, the Secretary, after having exhausted all efforts to negotiate a contract pursuant to this Act and the Regulations promulgated thereunder, shall, in his discretion, relieve those employers who, in his judgment, comply with the applicable federal standards and regulations from complying with said obligation. Notwithstanding the above, the Secretary shall retain supervisory authority to guarantee full compliance of the conditions stipulated in the job offer filed by any employer."

Section 2.—A new Section 4 is hereby added to Act No. 87 of June 22, 1962 as amended, to read as follows:

> "Every contract for workers to render services abroad shall be guaranteed by the person who contracts for such services, in the manner the Secretary of Labor deems convenient."

Section 3.—A new Section 5 is hereby added to Act No. 87 of June 22, 1962 as amended, to read as follows:

---

[1] Secretary of Labor and Human Resources.

"The Secretary of Labor, on his own account or by request of any workers, shall provide any technical or legal help he deems necessary to protect the rights and interests of the workers in the proper forum."

Section 4.—Section 4 of Act No. 87 as amended, is renumbered as Section 6.

Section 5.—Section 5 of Act No. 87 of June 22, 1962 as amended, is renumbered as Section 7.

Section 6.—Section 6 of Act No. 87 of June 22, 1962 as amended, is renumbered as Section 8.

Section 7.—Section 7 of Act No. 87 of June 22, 1962 as amended, is renumbered as Section 9.

Section 8.—Section 8 of Act No. 87 of June 22, 1962 as amended, is renumbered as Section 10.

Section 9.—Section 9 of Act No. 87 of June 22, 1962 as amended, is renumbered as Section 11.

Section 10.—Section 10 of Act No. 87 of June 22, 1962 as amended, is renumbered as Section 12.

Section 11.—Section 11 of Act No. 87 of June 22, 1962 as amended, is renumbered as Section 13.

Section 12.—Due to the urgency and need of this Act, it shall take effect immediately after its approval by the Governor.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

Civil Action No. 79-0007(H)

THE COMMONWEALTH OF PUERTO RICO,
ON THE RELATION OF CARLOS S. QUIROS, SECRETARY,
DEPARTMENT OF LABOR AND HUMAN RESOURCES,
Plaintiff

v.

ALFRED L. SNAPP & SON, INC., *et al.*,
Defendants.

By: James C. Turk, Chief, U.S. District Judge

ORDER

In accordance with the memorandum opinion this day filed, it is ADJUDGED and ORDERED that defendants' motion to dismiss be, and the same hereby is granted, and the action is dismissed with prejudice and stricken from the docket of the Court.

ENTER: This 17th day of April, 1979.

/s/ James C. Turk
Chief U.S. District Judge

Office-Supreme Court, U.S.
FILED
MAR 4 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALFRED L. SNAPP & SON, INC., *et al., Petitioners,*

v.

COMMONWEALTH OF PUERTO RICO
on the relation of PEDRO BAREZ,
SECRETARY, DEPARTMENT OF LABOR AND
HUMAN RESOURCES, *Respondent.*

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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March 4, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

The Respondent Commonwealth of Puerto Rico respectfully prays that the Court deny the requested writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October 9, 1980.

QUESTION PRESENTED

May the Commonwealth of Puerto Rico sue as *parens patriae* for declaratory and injunctive relief against the violation by Virginia apple growers of a pervasive federal statutory and regulatory scheme which mandates that available domestic workers be given preference over foreign labor in temporary agricultural employment where: (1) the Commonwealth, which in 1978 suffered from 23% rural unemployment, has attempted since 1975 to place its unemployed farm workers in apple picking jobs with the petitioner growers; (2) the petitioners continue to accord preference to Jamaican workers over Puerto Rican workers; (3) the petitioners have engaged in coordinated, industry-wide resistance to the employment of Puerto Rican workers in apple picking jobs; and (4) only the Commonwealth is capable of securing comprehensive relief.

PARTIES TO THE PROCEEDING BELOW

Respondent concurs in the statement of parties to the proceeding contained in the Petition for Writ of Certiorari. However, the Honorable Pedro Barez has succeeded the Honorable Carlos Quiros as Secretary of the Department of Labor and Human Resources, upon whose relation this action has been brought.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1305

ALFRED L. SNAPP & SON, INC., *et al.*, *Petitioners,*

v.

COMMONWEALTH OF PUERTO RICO
on the relation of PEDRO BAREZ,
SECRETARY, DEPARTMENT OF LABOR AND
HUMAN RESOURCES, *Respondent.*

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DECISIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

Respondent is satisfied with these sections as they appear in the Petition for Writ of Certiorari at pp. 1-2.

STATEMENT OF THE CASE

This litigation is but one chapter in a controversy over the hiring of Puerto Rican agricultural workers for the annual apple harvest in East Coast states. At the heart of the controversy is the federally guaranteed right

of Puerto Ricans, as U.S. citizens, to a preference over alien labor in the competition for temporary agricultural work.

The Immigration and Nationality Act of 1952, 8 U.S.C. §§1101 *et seq.* ("INA"), permits the admission of aliens for the purpose of performing temporary agricultural work only "if unemployed persons capable of performing such service or labor cannot be found in this country. . . ." 8 U.S.C. §1101(a)(15)(H)(ii). The policy of Congress, as expressed in the INA, is that U.S. workers rather than aliens be employed wherever possible. *See, e.g., Elton Orchards, Inc.* v. *Brennan*, 508 F.2d 493, 500 (1st Cir. 1974). Pursuant to this policy, Immigration and Naturalization Service ("INS") regulations require that an employer's petition for the admission of nonimmigrant aliens be accompanied by a certification from the U.S. Secretary of Labor that U.S. workers are not available to do the work. 8 C.F.R. §214.2(h)(3).

The Secretary of Labor tests the availability of domestic workers by transmitting employers' job offers through the Interstate Clearance System ("ICS"), a network originally established by the Wagner-Peyser Act of 1933, 29 U.S.C. §§49-49k, to facilitate the flow of laborers from supply states to demand states during the Great Depression. The Puerto Rico Employment Service, an agency of the Commonwealth Department of Labor ("PRDOL"), has long been an active participant in the ICS.

The Commonwealth Government, alarmed at the rising level of unemployment in Puerto Rico, has attempted since 1975 to refer unemployed agricultural workers through the ICS to East Coast orchards for

work in the apple harvest. Second Amended Complaint (hereinafter "Complaint"), par. 61. Each year, concerted grower resistance to Puerto Rican workers has rendered these efforts largely unsuccessful. In 1976, despite extensive negotiations between representatives of East Coast growers and PRDOL which resulted in an agreement to hire 1000 Puerto Rican workers, the growers hired only 613 workers and dismissed the majority of these almost immediately for alleged unproductivity. In 1977, the growers refused to negotiate at all with PRDOL. Only 93 Puerto Rican workers found jobs in the apple harvest, and the majority of these were also dismissed within a short period of time for alleged unproductivity. Complaint, par. 61.

In all three years — 1975, 1976 and 1977 — the growers relied chiefly on the existence of Puerto Rico Public Law 87 ("P.L. 87"), 29 L.P.R.A. §§526 *et seq.* (1966), as amended, to justify their resistance to hiring Puerto Rican workers. This law, enacted originally in 1947 for the purpose of protecting Puerto Rican migrant farm workers employed off-island, requires mainland employers to negotiate a contract for the services of these workers. The apple growers objected to various mandatory contract conditions — such as health insurance benefits and three hot meals a day — as "onerous" and "burdensome," and took the position that Puerto Rican workers who insisted on benefits beyond the minimum federal conditions were not "available" U.S. workers within the meaning of the INA. This position was upheld in subsequent litigation. *Galan* v. *Dunlop*, 411 F.Supp. 268 (D.D.C. 1975), *appeals dismissed and remanded* 511 F.2d 467 (D.C. Cir. 1977) (unpublished); *Hernandez Flecha* v. *Quiros*, 567 F.2d 1154 (1st Cir. 1977), *cert. denied sub nom. Hernandez Flecha* v. *Marshall*, 436 U.S. 945 (1978).

Following the *Hernandez Flecha* decision, the legislature of Puerto Rico recognized that P.L. 87 was not serving its intended purpose to advance the interests of Puerto Rican workers, but was instead being used to bar their employment in the annual East Coast apple harvest. Accordingly, in July of 1978 the legislature passed an amendment to P.L. 87 which was specifically intended to remove this barrier. The amendment authorized the Commonwealth Secretary of Labor to exempt prospective employers from the requirement of negotiating a contract for the services of the workers if the employers' job offers complied with federal requirements.[1] In the preamble to this amendment, the Commonwealth legislature declared:

> At present, there is a great mass of potential workers available and willing to obtain lucrative employment. In view of this situation, it is important for reasons of public policy to seek a solution that will allow adequate channeling of the aspirations and needs of these persons to obtain a job, without needlessly harming the workers' interest in obtaining the maximum protection available.

The legislature was therefore willing, in appropriate circumstances, to rely on federal law as the sole constraint on employer conduct.

---

[1] Labor Certification Process regulations issued by the U.S. Department of Labor ("USDOL") under the INA and the Wagner-Peyser Act require certain minimal benefit, wage, and working condition provisions to be included in all job offers transmitted through the ICS. 20 C.F.R. §655.202 (1978). These federally mandated minimum conditions become the terms of the "contract" between the employer and the worker.

Immediately following the effective date of this amendment, then-Labor Secretary Quiros announced his intention to exempt from the contract requirements of P.L. 87 those apple growers whose 1978 job offers met federal requirements and were transmitted through the ICS. USDOL promptly cleared 2318 job offers to Puerto Rico. Over 1000 workers were recruited by the week of August 14, 1978, and more than enough workers were subsequently recruited before the start of the harvest season to fill the total number of job offers received. Complaint, pars. 63 and 64.

Faced with the prospect that a large number of Puerto Rican workers would be referred to jobs in the apple harvest and with the corollary prospect that fewer Jamaican workers could be imported, growers and grower associations from Virginia, New York, Maryland and West Virginia filed an action in the U.S. District Court for the Western District of Virginia seeking to have the Puerto Rican workers once more declared "unavailable." *Frederick County Fruit Growers Association, Inc., et al.* v. *F. Ray Marshall, et al.*, No. 78-0086(H) (W.D. Va., complaint filed August 31, 1978), *appeals dismissed and remanded* 594 F.2d 857 (4th Cir. 1979) (unpublished), *dismissed as moot* (W.D. Va., June 16, 1980) (unpublished). Although satisfied that Puerto Rican workers were "available" within the meaning of the INA, the district court (Turk, Ch. J.) nevertheless granted an injunction forcing the issuance of nonimmigrant visas for alien laborers in the full number requested by the grower plaintiffs.

Puerto Rican workers thereafter arriving at the orchard gates suffered refusals to hire and early dismissals on a massive scale. Only 992 of the 2318 workers recruited even arrived on the mainland. The

flights of the remainder were cancelled because growers were refusing to hire those who had already arrived. Fewer than 30 Puerto Ricans remained employed by Virginia orchards three weeks into the harvest season. Complaint, pars. 64. 66, 67 and 69.

The Commonwealth, confronted again with widespread and concerted resistance to the employment of its citizens, filed the instant action for declaratory and injunctive relief on January 11, 1979, in the U.S. District Court for the Western District of Virginia. On the following day, January 12, 1979, a companion action was instituted against 55 apple industry defendants in the U.S. District Court for the Southern District of New York. *Commonwealth of Puerto Rico ex rel. Carlos S. Quiros* v. *Louis Bramkamp, et al.*, No. 79 Civ. 0199 (KTD). Identical motions to dismiss were filed by the defendant growers in both actions.

On April 19, 1979, Chief Judge James Turk of the Western District of Virginia — who had earlier mandated the entry of additional Jamaican workers for the 1978 apple harvest — dismissed the Commonwealth's complaint for want of *parens patriae* standing. The court held that because the 1978 harvest jobs were temporary and because direct harm from defendants' conduct befell less than a substantial majority of the Commonwealth's citizens, the resulting injury to the Commonwealth was neither severe nor generalized enough to permit the Commonwealth to take up the cause. 469 F.Supp. 928, 934 (W.D.Va. 1979). Five months later, Judge Kevin T. Duffy of the U.S. District Court for the Sourthern District of New York, in a one-sentence memorandum endorsement, dismissed the Commonwealth's complaint in the companion *Bramkamp* case "for reasons stated in the decision of

Judge James Turk." The Commonwealth's appeal from this decision was docketed as No. 79-7777 and was argued on February 4, 1981, before the U.S. Court of Appeals for the Second Circuit (Circuit Judges Feinberg and Newman, and Senior District Judge Mishler).

On October 9, 1980, the U.S. Court of Appeals for the Fourth Circuit reversed the district court and held that the Commonwealth possesses standing to maintain this action as *parens patriae*. 632 F.2d 365 (4th Cir. 1980). The growers' petition for rehearing and suggestion of rehearing *en banc* was denied December 16, 1980, and their motion for stay of mandate pending application to this Court for a writ of certiorari was denied December 29, 1980. On January 26, 1981, the Chief Justice denied the growers' application for stay of mandate filed in this Court on January 23, 1981.

REASONS WHY THE WRIT SHOULD BE DENIED

I. There Is Presently No Conflict Among The Circuits.

Petitioners are technically correct in stating that the decision of the Fourth Circuit which they seek to have reviewed in this Court conflicts with the decision of Judge Duffy of the Southern District of New York. The actual conflict, however, was between the district court in Harrisonburg, Virginia and the Court of Appeals in Richmond, Virginia. The Virginia district court produced a written opinion of eight pages, and the Court of Appeals reversed the district court in a written opinion of seven pages. The decision of the district court in New York, upon which petitioners rely for a conflict, was accompanied by a one-sentence opinion relying on the opinion of the Virginia district court and containing no new or additional thoughts on the issue of

parens patriae standing. Moreover, while petitioners suggest the possibility of an affirmance by the Second Circuit as grounds for granting the writ, petitioners advance no reason to believe such an affirmance is likely. Their suggestion is thus, at its very best, premature.

II. The Decision Below Is In Full Accord with Prior Decisions Of This Court.

Petitioners argue that the decision of the Fourth Circuit is "in conflict" with prior decisions of this Court. But a conflict does not arise merely because a lower court has applied the principles of prior Supreme Court decisions to a new and different set of facts. Petitioners have shown no direct and irreconciliable conflict with prior decisions of this Court sufficient to support a grant of certiorari. They are merely arguing that the decision below was erroneous, and their argument rests on a persistent mischaracterization of the nature of this action.

In support of the alleged conflict, petitioners urge the Court to read the Fourth Circuit's opinion as one allowing the Commonwealth to sue East Coast apple growers for breaching their contracts with Puerto Rican workers even if only one worker's contract was breached and regardless of the ability of that worker to sue for full relief. Petition, pp. 11-15. If the Fourth Circuit had so held, Respondent would admit the decison to be questionable. But the Fourth Circuit did not so hold.

The Commonwealth's complaint alleged that by refusing to hire Puerto Rican workers, by terminating Puerto Rican workers on various pretexts, and by subjecting Puerto Rican workers to working conditions less favorable than those provided to Jamaican workers,

the defendant apple growers have caused and continue to cause irreparable injury to the Commonwealth by frustrating its efforts to participate in the federal employment system as a labor supply state, hindering the Commonwealth Secretary of Labor in the performance of his statutory charge to further the interests and promote the opportunities of Puerto Rican laborers,[2] and depriving the Commonwealth's citizens of rights and benefits guaranteed them by federal law. The complaint alleged specific examples of unlawful acts against each of the defendant growers.

The Fourth Circuit, in finding these allegations sufficient to support *parens patriae* standing, honored the accepted rule that on a motion to dismiss under Fed.R.Civ.P. 12(b) a court must accept as true all material allegations of the complaint, and must draw therefrom all reasonable inferences in favor of the plaintiff. *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975); *Jenkins* v. *McKeithen*, 395 U.S. 411, 421-422 (1969). The court thus necessarily rejected the narrow characterization of this suit which petitioners successfully urged on the district court, *i.e.*, a simple action for breach of contract in which the Commonwealth undertook to prosecute, as a volunteer, the personal claims of its citizens. The Fourth Circuit correctly recognized that such a characterization cannot stand here, where the complaint alleges unlawful acts broadly directed toward Puerto Rican workers as a whole, and the requested relief will accrue not to ascertainable persons but to a broad, presently indefinable portion of the Puerto Rican citizenry.

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[2] 3 L.P.R.A. §§305, 306 (1965); 29 L.P.R.A. §529 (1966), as amended July 13, 1978.

This Court's prior decisions have firmly established that a state asserting *parens patriae* standing must assert a quasi-sovereign interest, an interest "apart from that of particular individuals who may be affected,"[3] "the gravamen of which runs far beyond the claim of damage to individuals,"[4] 'independent of and behind the titles of its citizens."[5] The complaint must assert "a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected." *Pennsylvania* v. *West Virginia*. 262 U.S. 553, 592 (1923).[6] The Court of Appeals applied this established principle to find that the Commonwealth asserts a justiciable quasi-sovereign interest in this action.

Alleged injuries to a state's general economy, which in substance implicate the state's interest in economic supervision, have been consistently recognized as conferring standing to sue as *parens patriae*. *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972). In *Georgia* v. *Pennsylvania R. Co.*, Georgia was permitted to invoke the original jurisdiction of the Court in a suit to outlaw discriminatory freight rates constituting "an invidious discrimination against a region or locality," 324 U.S. at 462, although individual shippers were most directly

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[3] *Georgia* v. *Pennsylvania R. Co.*, 325 U.S. 439, 451 (1945).

[4] *Id.*, at 452.

[5] *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

[6] *See also Commonwealth of Pennsylvania* v. *Kleppe*, 533 F.2d 668, 674 (D.C. Cir. 1976) (controversy must in substance implicate state's interest in economic supervision); *Kelley* v. *Carr*, 442 F.Supp. 346, 356 (W.D. Mich. 1977) (inherent in concept of quasi-sovereign interest is protection of the public interest).

affected by the discriminatory rates and were capable of prosecuting their own actions. The Court of Appeals correctly perceived that the discriminatory barriers against employment of Puerto Ricans alleged to have been erected by the defendant growers in this action are analogous, in their crippling effect on the Puerto Rican economy, to the discriminatory rates alleged in the *Pennsylvania Railroad* case.

Petitioners urge as error the Fourth Circuit's consideration of indirect and future harm to the Commonwealth, beyond "the relatively small number of Puerto Rican workers involved in the 1978 Virginia apple harvest." Petition, p. 12. But the Fourth Circuit correctly observed that a substantial number of the sovereign's citizens need not be directly injured:

> There has never been cast a hard and fast game of numbers. . . . It is the magnitude and pervasiveness of the societal harm which must be weighed — not the directness of the injury to particular individuals.

632 F.2d at 370. (Footnote omitted.) The Court of Appeals faithfully applied the principles of this Court's decisions to the case before it. It is petitioners who urge a departure from those principles.

III. This Case Is Not One Of First Impression.

Petitioners would have the Court review the Fourth Circuit's decision because "this would be the first case to raise the issue [of *parens patriae* standing] in the context of alleged employment discrimination and contractual violations." Petition, p. 15. But every case which comes before a court involves application of legal principles to a new set of facts. The general principles of law enunciated by this Court are not limited in applicability to the factual matters out of which they

arise. It would be extraordinary to learn, for instance, that the observations of Mr. Justice Holmes in *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, apply only when a state is injured by noxious gases transported over its border by the wind.

Recognition of harm to the general economy of a state as an injury to the state's quasi-sovereign interests is not new. This is not the first case in which harmful conduct is alleged to be directed toward the citizens of a particular state or region, *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, nor is it the first case to recognize a state's interest in protecting and enhancing the welfare of its citizens by securing to them rights guaranteed by federal law. *See, e.g., New York* v. *United States*, 65 F.Supp. 856, 872 (N.D.N.Y. 1946), *aff'd* 331 U.S. 284. Each decision on *parens patriae* standing hinges on analysis of the peculiar facts of the case, whether set forth in the allegations of a complaint, as here, or whether developed during the course of trial. The Fourth Circuit correctly applied recognized principles of the *parens patriae* doctrine to the particular circumstances of this case.

CONCLUSION

For the reasons set forth above, the Court should deny the requested writ.

Respectfully submitted,

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No. 80-1305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALFRED L. SNAPP & SON, INC., *et al.*,
Petitioners,

v.

COMMONWEALTH OF PUERTO RICO
On the relation of PEDRO BAREZ, SECRETARY,
DEPARTMENT OF LABOR AND HUMAN RESOURCES,
Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

RESPONSE OF COMMONWEALTH OF PUERTO RICO TO SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Brief for the Secretary of Labor as Amicus Curiae dated April 6, 1981, in Commonwealth of Puerto Rico v. Louis Bramkamp, et al., No. 79-7777 (2d Cir., argued February 4, 1981)

No. 80-1305

IN THE

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COMMONWEALTH OF PUERTO RICO
on the relation of PEDRO BAREZ, SECRETARY,
DEPARTMENT OF LABOR AND HUMAN RESOURCES,
Respondent.

Response of Commonwealth of Puerto Rico to Supplemental Brief In Support of Petition for Writ of Certiorari

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Respondent Commonwealth of Puerto Rico submits this response to petitioners' Supplemental Brief. The Supplemental Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was filed with the Court on May 1, 1981, and was received by counsel for respondent on May 4, 1981. According to petitioners, the Supplemental Brief is submitted pursuant to Supreme Court Rule 22.6. That Rule provides that any party may file a supplemental brief at any time while a petition for writ of certiorari is pending "calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing."

The occasion for the filing of petitioners' Supplemental Brief pursuant to Rule 22.6, "the intervening matter," is the filing of an *amicus curiae* brief by the U.S. Secretary of Labor

in a companion action in the United States Court of Appeals for the Second Circuit.[1] Remarkably, petitioners did not provide this Court a copy of the Secretary's *amicus* brief but instead petitioners have filed a Supplemental Brief which deals with alleged shortcomings of the Secretary's *amicus* brief. Petitioners' Supplemental Brief thus takes on the character of a presentation of Hamlet without the Prince of Denmark. We cure this flaw by appending hereto a copy of the Secretary's *amicus* brief filed on April 6, 1981. The Secretary therein concludes that "federal policy considerations do not weigh against granting Puerto Rico standing to sue as *parens patriae.*" Appendix, at 10a.

ARGUMENT

The Complaint System Established by the U.S. Department of Labor to Investigate and Resolve Employee Complaints Against Alleged Employer Violations of Federal Labor Certification Regulations Is Not Designed to Redress Puerto Rico's Complaint of Industry-Wide Resistance to Employment of Puerto Rican Workers.

Petitioners attempt on Supplemental Brief an additional argument to support grant of petition for writ of certiorari, viz., permitting the Commonwealth to sue as *parens patriae* in cases like this "will unnecessarily clog the federal courts with cases that the complaint system was created to resolve." Supplemental Brief, at 2-3. However, it is the Secretary of Labor who has the principal federal responsibility for administration of the

[1] Commonwealth of Puerto Rico v. Louis Bramkamp, et al. No. 79-7777 (2d Cir. Appeal argued February 4, 1981)is a companion to the instant case, both cases being *parens patriae* actions by the Commonwealth of Puerto Rico against defendant apple growers for alleged mistreatment of Puerto Rican workers by Virginia and New York growers during the 1978 East Coast apple harvest. On February 5, 1981, the day after oral argument in the *Bramkamp* case, the clerk on the request of the panel which heard the case invited the Solicitor General "to file an amicus brief on behalf of the appropriate government agency or agencies on the issues involved in the appeal." On April 6, 1981, the Secretary of Labor filed an amicus brief.

federal-state employment service system established under the Wagner-Peyser Act and who performs a critical role in certifying use of temporary foreign workers, and he asserts that his complaint procedures are not designed to cope with allegations of industry-wide conduct:

> Although an aggrieved employee may obtain back pay through the complaint system by settlement or through threat of denial of access to the employment service system or of future temporary labor certification, the complaint system does not contemplate injunctive relief or attendant contempt proceedings.
>
> Moreover, regardless of the efficacy of the system in handling individual complaints, these procedures were not intended to redress Puerto Rico's allegations of systemic mistreatment of Puerto Rican workers. The allegations in this complaint illustrate the difficulty the Department would have in investigating an alleged pattern of misconduct involving hundreds of workers and dozens of employers spread over one or more states.

Amicus Brief for the Secretary of Labor, Appendix at 8a-9a.

The Secretary is clearly correct when he asserts that "the complaint system does not contemplate injunctive relief or attendant contempt proceedings," Appendix, at 8a, and, equally, petitioners are simply wrong in stating that "the USDOL does have the authority to go into court to seek injunctive relief and attendant contempt proceedings itself." Supplemental Brief at 3-4, n. 2.

The Secretary of Labor administers the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, involving wage and hour and child labor provisions, and the Secretary is specifically authorized by Congress to seek injunctions in U.S. district courts to enforce minimum wage and hour standards under that Act. 29 U.S.C. § 217. The Secretary also administers the Farm Labor Contractor Registration Act, 7 U.S.C. § 2041-2053, regulating the activities of contractors for the services of migrant agricultural laborers, and the Secretary is specifically authorized by Congress to petition any appropriate U.S. district court for

injunctive relief against any violation of the provisions of the Act. 7 U.S.C. § 2050a(c). Similarly, the Secretary's authority to seek enforcement in U.S. courts of appeal of final orders of the Occupational Safety and Health Review Commission is spelled out in 29 U.S.C. § 660(b). The relevant statutes in the instant case are the Wagner-Peyser Act, 29 U.S.C. §§ 49-49k, and the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. Nowhere in those statutes is the Secretary authorized to seek injunctive relief against employers for alleged violations of regulations relating to treatment of domestic migrant laborers in the interstate clearance system.

Western Colorado Fruit Growers Ass'n v. *Marshall*, 473 F.Supp. 693 (D. Colo. 1979), the single case cited by petitioners for the proposition that the Secretary "has sought [injunctive relief] on previous occasions," Supplemental Brief at 4, n. 2, is inapposite. In *Western Colorado*, the Secretary had been haled into court as defendant and took that occasion to *counterclaim* for an injunction prohibiting plaintiff from interfering with defendant's administration of the interstate clearance system. Were the Secretary to go into court as a plaintiff to enjoin a grower from violating labor certification regulations, he would be unable to point to a grant of jurisdiction in the court to entertain the cause.

Petitioners point out that under the Employment Service Complaint System a complaint filed by an aggrieved individual is investigated by the state employment service in the state in which the alleged violation occurred. Petitioners thus argue that a labor supply state, such as the Commonwealth of Puerto Rico in the instant case, does not have a role in the investigation of complaints by Puerto Rican workers. But the interest of the Commonwealth of Puerto Rico lies not in after-the-fact remedies—its complaint does not seek money damages—but in being able to refer Puerto Rican workers to jobs in future East Coast apple harvests. Even if individual Puerto Ricans based in the Commonwealth could effectively utilize the administrative complaint procedure against growers based in Virginia, it is simply not designed to handle industry-wide conduct which affects Puerto Rico's right to refer workers in future seasons.

The remainder of petitioner's Supplemental Brief argues facts, the source of the facts being an affidavit in other litigation and an undated communication between petitioner's counsel and a Virginia state employment official. None of these facts is part of the record in the instant case. Thus, at pages 5 through 7 of the Supplemental Brief, petitioners refer to and argue from an affidavit filed on August 11, 1980 by Mr. Kenneth Hamlett, an official of the U.S. Department of Labor, in *Rios, et al.* v. *Marshall, et al.*, No. 79 Civ. 5711 (U.S. District Court for the Southern District of New York). Mr. Hamlett's affidavit states, in part, that 120 complaints were filed by Puerto Rican workers as a result of their experiences in the 1978 New York apple harvest and that "In all cases, New York State was unable to substantiate the complaints of those workers." Supplemental Brief, at p. 5. With respect to Virginia, petitioners assert that 178 Puerto Ricans who worked in Virginia in the 1978 apple harvest filed complaints and, again, "in all cases the Virginia Employment Commission was unable to substantiate the complaints of those workers." Supplemental Brief, at 5-6.

Manifestly this information cannot properly be considered by the Court in connection with the instant case.[2] Apart from not being in the record, it is not "intervening matter not available at the time of the party's last filing," as required by Rule 22.6. Petitioners' last filing was its Petition for Writ of Certiorari filed on February 2, 1981, and certainly the Puerto Ricans' lack of success with the New York and Virginia state employment services was available at that time.

In any event the argument is wide of the mark. The complaint alleged against the growers a pattern of conduct in refusal to hire and early termination of Puerto Ricans who appeared for work in the orchards. The complaint further alleged that some 1300 Puerto Ricans who had signed up for jobs in the 1978 apple harvest never left Puerto Rico because the U.S. Department of Labor advised Secretary Quiros that many growers had refused to employ those Puerto Ricans who had already arrived (Par. 64, Second Amended Complaint).

[2] See Adickes v. Kress & Co., 398 U.S. 144, 157, n. 16 (1970).

The concern of the Commonwealth of Puerto Rico, and its complaint in the instant case, is the widespread pattern of conduct by defendant growers directed against Puerto Rican workers. Administrative complaints brought by individuals cannot remedy the injury to its quasi-sovereign interest alleged here by the Commonwealth, viz., being deprived by defendants of its right to participate effectively in the Federal Employment Service System and to serve as a labor supply state in coming years for unemployed migrant farm workers in connection with a major crop.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 79-7777

THE COMMONWEALTH OF PUERTO RICO
on the relation of Carlos S. Quiros, Secretary,
Department of Labor and Human Resources,
Plaintiff-Appellant

v.

LOUIS BRAMKAMP, *et al.*
Defendants-Appellees

On Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

STATEMENT OF THE ISSUE

Whether the Commonwealth of Puerto Rico has standing to sue as *parens patriae* where it alleges a denial of its right to full participation in the United States Employment Service System resulting from a pattern of discriminatory actions by defendants against Puerto Rican citizens.

STATEMENT OF THE CASE

The Commonwealth of Puerto Rico has appealed from the district court's dismissal of its complaint against the defendants,

apple growers in New York State, for lack of standing. Puerto Rico, asserting that it had standing as *parens patriae,* alleged in its complaint that defendants had committed various violations of the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.;* the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1101 *et seq.,* and the labor certification and Wagner-Peyser Act regulations promulgated by the Secretary of Labor.

Essentially, Puerto Rico claimed that defendants deprived Puerto Rico of its "right to effectively participate in the benefits of the Federal Employment Service System of which it is a part and to serve as a supplier state for migrant farm workers in connection with a major crop" by discriminating against Puerto Rican workers regarding the terms of their employment, by improperly terminating the employment of Puerto Rican workers, and by refusing to offer jobs to Puerto Ricans during the 1978 apple harvest in New York State (J.A. 147). Puerto Rico sought declaratory and injunctive relief to prevent defendants from engaging in such actions during future apple harvests. The district court in this case, adopting the reasoning of the District Court for the Western District of Virginia in a companion case,[1] dismissed Puerto Rico's complaint for lack of standing as *parens patriae.* Puerto Rico appealed to this Court for reversal of the district court's order.

STATEMENT OF INTEREST

By letter dated February 5, 1981, this Court requested the Solicitor General of the United States to file a brief as amicus curiae on behalf of the appropriate government agency on the issues raised by this case. Because the Secretary of Labor has the principal federal responsibility for administration of the

[1] *Commonwealth of Puerto Rico, etc.* v. *Alfred L. Snapp & Son, Inc., et al.,* 469 F.Supp. 928 (1979). The Fourth Circuit subsequently reversed the district court's decision on the standing issue (632 F.2d 365 (1980)) and denied the defendant's petition for rehearing and suggestion for rehearing en banc. The defendants' petition for a writ of certiorari in *Snapp* is pending before the United States Supreme Court.

federal-state employment service system, and because of the Secretary's role in certifying the use of temporary foreign workers, the Secretary submits this brief as amicus curiae. In an effort to assist this Court in its consideration of this case, we will present an outline of the labor certification and employment service system, a history of Puerto Rican worker involvement in the East Coast apple harvest, and the government's view on the standing of Puerto Rico as *parens patriae* to bring this suit.

DISCUSSION

A. Certification of Temporary Foreign Workers

The primary responsibility for overseeing the admission of aliens into the United States, including those non-immigrants admitted to perform temporary work for an employer, lies with the Commissioner of the Immigration and Naturalization Service, pursuant to the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* Under that statute, the INS may allow entry of temporary foreign agricultural workers when "unemployed persons capable of performing such service or labor cannot be found in this country . . . ." 8 U.S.C. 1101(a)(15)(H)(ii). The Commissioner has delegated to the Secretary of Labor the authority to certify whether domestic workers are available to fill positions which employers seek to fill with temporary foreign workers, and whether the employment of foreign workers in those positions would adversely affect the wages or working conditions of domestic workers. 8 C.F.R. 214.2(h)(3). The INS may use the information provided by the Secretary of Labor as a basis for denying or allowing the entry of temporary foreign workers.

The Secretary's regulations provide that an employer who wants to hire temporary foreign workers must file a job order and certification application with a state agency of the Federal-state employment service system created pursuant to the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.;* 20 C.F.R. 655.0, 655.200, 655.201(a)(1). The state forwards the application to the Regional Administrator of the Department of Labor, and the Department decides whether or not to approve the certification after first making a determination as to the availability of

U.S. workers and the adverse effect of the employment of foreign workers on the wages and working conditions of U.S. workers. The Department advises the INS of its actions on temporary labor certifications and the INS makes the final determination whether to grant visas to foreign workers, 8 U.S.C. 1184(a); 8 C.F.R. 214.2(h)(3).

Pursuant to the mandate of the Immigration and Nationality Act, the Secretary's regulations regarding temporary labor certifications contain requirements which attempt to ensure that temporary foreign workers do not displace available domestic workers. Thus, the regulations require that an employer file certification applications with the state employment service agency in sufficient time to allow the agency to recruit domestic workers locally and through the intrastate and interstate employment service clearance systems established pursuant to the Wagner-Peyser Act. 20 C.F.R. 655.201(c). The regulations also require that a certification application be accompanied by a copy of the job offer that the employer intends to use to recruit domestic and foreign workers. 20 C.F.R. 655. 201(b)(1). The employer must offer domestic workers at least the same benefits as those offered foreign workers, and must not impose greater restrictions on domestic than foreign workers. 20 C.F.R. 655.202(a). An employer who applies for temporary labor certification must sign a set of assurances which provide, *inter alia,* that the employer will comply with applicable federal, state and local employment laws (20 C.F.R 655.203(b)), and that the employer will cooperate with the employment service system in the recruitment of U.S. workers (20 C.F.R. 655.203(d)). The assurances further provide that the job is open "to all qualified U.S. workers without regard to race, color, national origin, sex, or religion . . .", and that "[n]o U.S. worker will be rejected for employment for other than a lawful job related reason." 20 C.F.R. 655.203(c).[2]

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[2] The authority of the Secretary to impose minimum standards for accepting an employer's job offer has been recognized by the Attorney General (41 A.G. 406, 1959), and sustained by a number of courts. *E.g., Gomez* v. *Florida State Employment Service,* 417 F.2d 569 (5th Cir. 1969); *NAACP* v. *Brennan,* 360 F.Supp. 1006 (D.D.C. 1973).

The Secretary's regulations provide a penalty for an employer's noncompliance with the terms of a temporary labor certification. The Department of Labor may initiate an investigation when it has "probable cause to believe that an employer has not lived up to the terms of the temporary labor certification." 20 C.F.R. 655.210(a). If the Department determines that the employer is not in compliance, the sanction is to deny labor certification during the following year. 20 C.F.R. 655.210.

As noted above, an employer who applies for temporary labor certification must provide a copy of the job order which it will use to recruit workers, and must utilize the services of the federal-state employment service system to recruit available U.S. workers. While the job order does not constitute a contract to which the Department of Labor is a party or of which it is a guarantor, 45 Fed. Reg. 39466 (June 10, 1980), Department regulations provide for the investigation of all complaints relating to failure to comply with the terms of the job offer or other applicable provisions. 20 C.F.R. 658 *et seq.*[3] These regulations, which are applicable to all employment service activities, mandate the creation of a complaint system within all state employment service agencies and the Department of Labor.

An aggrieved individual may file a complaint with any state employment agency; but the complaint will be investigated by the state in which the alleged violation occurred.[4] For example, a Puerto Rican worker involved in the apple harvest in New York state could file a complaint in New York, or with the Puerto Rico employment agency upon his return. In the latter event, the Puerto Rico agency would forward the complaint to New York for processing. The state agency is

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[3] The employment service complaint system was revised in June, 1980. 45 Fed. Reg. 39469 (June 10, 1980).

[4] When an employer is alleged to have failed to comply with the terms of a temporary labor certification, the state agency notifies the Department of Labor so that it may determine whether the employer should be denied labor certification during the following year. 20 C.F.R. 658.501(c).

required by a 1980 amendment to the regulations to hold a hearing on all complaints which are not settled informally. The regulations provided in 1978 and still provide that a party may appeal the state's decision to the Regional Administrator of the Department of Labor, 20 C.F.R. 658.418(c), after he has exhausted his state remedies. 20 C.F.R. 658.421(a). The Department of Labor may conduct further investigation of and a hearing on the complaint. 20 C.F.R. 658.421(c) and (e), 658.424. The ultimate remedy available against an employer found to have failed to comply with the terms of a job order or to have committed other violations is the denial of access to the employment service system. This remedy is imposed by the state in accordance with federal regulations. 20 C.F.R. 658.501(a).

Citizens of Puerto Rico are United States citizens who, when available for work, are entitled to priority in employment over temporary foreign workers. The Commonwealth of Puerto Rico is considered a "state" for the purposes of recruitment and referral of workers through the federal-state employment system established by the Wagner-Peyser Act. 29 U.S.C. 49b(b). However, despite the rights accorded to Puerto Rican citizens by law, employment of Puerto Rican workers in the East Coast apple harvest has been problematic. As the Commonwealth acknowledged in its brief, before 1978, Puerto Rico Public Law 87 proved an impediment to the hiring of Puerto Rican workers for the apple harvest in that it imposed requirements on mainland employers beyond those mandated by federal law. The United States Department of Labor ruled that Puerto Ricans who insisted on these contract provisions were not "available" U.S. workers within the meaning of the Immigration and Nationality Act and the applicable federal regulations. The First Circuit upheld the Department's ruling. *Flecha* v. *Quiros,* 567 F. 2d 1154 (1977), cert. denied, 436 U.S. 945.

In July 1978, Puerto Rico amended Public Law 87 to allow waiver of that law's requirements, and Puerto Rico's Labor Secretary Quiros announced that apple growers whose job orders complied with the 1978 federal requirements would be exempted from the requirements of Public Law 87. Puerto

Rico here alleges that, notwithstanding that exemption, defendant growers engaged in widespread refusals to hire or dismissals of available Puerto Ricans in 1978.[5]

B. The Standing of Puerto Rico to Sue as *Parens Patriae*

Puerto Rico seeks standing to represent its citizens as *parens patriae* in this action. In such a suit, a state must possess a "quasi-sovereign" interest beyond that of its individual citizens. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1977). In the case companion to the instant case, *Commonwealth* v. *Snapp*, both the district court and the Fourth Circuit recognized the Commonwealth's quasi-sovereign interest in the health of its endangered economy and the employment opportunities of its citizens. 632 F. 2d 365, 369-370 (1980), 469 F.Supp. 928, 932 (1979). While weighing the factors differently, the two courts agreed that the relevant considerations in deciding whether the sovereign's interest is justiciable are: the size of the affected population, the magnitude of the harm, and the ability of the injured citizens to obtain complete relief on their own. *Commonwealth* v. *Snapp*, 632 F.2d at 369, citing *Pennsylvania* v. *Kleppe*, 533 F.2d 668, 674-675 (D.C. Cir. 1976).

The interest of the federal government here appears to be relevant only to the last factor, the ability of the injured persons to obtain relief, either independently or through the auspices of the federal government. In the view of the Secretary of Labor, federal policy considerations do not weigh against granting the Commonwealth standing to pursue its action as *parens patriae*.

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[5] In 1979, the Puerto Rico employment agency did not recruit any Puerto Rican workers for the apple harvest because existing regulations under the Farm Labor Contractor Registration Act, 7 U.S.C. 2041 *et seq.*, arguably required the growers to obtain proof of citizenship. 29 C.F.R. 40.51(p). Before the 1980 harvest began, the FLCRA regulations were amended to establish the presumption that all workers recruited through the federal-state employment service system are U.S. citizens. 29 C.F.R. 40.51(p)(1)(xi). That fact, plus the new hearing requirement, are clearly improvements on the employment possibilities for Puerto Ricans since 1978.

To the extent that the Commonwealth has an interest "independent of and behind the titles of its citizens," *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), and "apart from that of the individuals affected," *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 592 (1923), its interest neither infringes on nor is inconsistent with the federal interest, and not wholly remediable under the federal regulations pertaining to individual complaints.

As the Courts have recognized, the Congressional policy, while allowing foreign workers to enter the country temporarily, is "to prefer domestic workers in all fields." *Flecha* v. *Quiros*, 567 F.2d 1154, 1155 (1st Cir. 1977). Indeed, "the thrust of the entire statutory-regulatory framework" of the immigration laws is "to prevent the employment of seasonal foreign workers from having an adverse effect upon domestic workers." *Florida Sugar Cane League* v. *Usery*, 531 F.2d 299, 303-304 (5th Cir. 1976). Consistent with that objective, the Secretary of Labor's preeminent concern in the labor certification area must be the protection of the interests of those domestic workers, including Puerto Ricans. See *Elton Orchards* v. *Brennan*, 508 F.2d 493 (1st Cir. 1974). Obviously, in that regard, the federal interest and that of the Commonwealth are entirely consistent.

To pursue its objective, the Department has adopted regulations aimed at protecting U.S. workers and establishing a system for investigating and processing the complaints of individual workers. However, investigative resources are severely limited, and time pressures in short-term seasonal farm work are great. Although an aggrieved employee may obtain back pay through the complaint system by settlement or through threat of denial of access to the employment service system or of future temporary labor certification, the complaint system does not contemplate injunctive relief or attendant contempt proceedings.

Moreover, regardless of the efficacy of the system in handling individual complaints, these procedures were not intended to redress Puerto Rico's allegations of systemic mistreatment of Puerto Rican workers. The allegations in this complaint illustrate the difficulty the Department would have in

investigating an alleged pattern of misconduct involving hundreds of workers and dozens of employers spread over one or more states. These allegations, if true, would constitute violations of law, which could entitle plaintiff to an injunction enforceable by contempt proceedings. Such an adjudication could, of course, provide the basis for future denials of certification by the Labor Department. Presumably, most questions arising in such a lawsuit would be factual, but to the extent that federal law is adjudicated, the Secretary of Labor could intervene to protect federal interests. Thus, suit for injunctive relief to prohibit mistreatment of Puerto Rican workers would not interfere with the employment service complaint procedures, but instead would provide a forum for raising allegations of systemic practices which are not easily addressed through the complaint procedures.

We express no view on the very important question whether plaintiff Puerto Rico has stated a claim for relief, and no view on the underlying merits. Moreover, we must stress that if standing is appropriate in this case, it is so only because of these unique circumstances: (1) The allegations in the complaint go beyond isolated individual claims, and involve a widespread pattern of denial of Puerto Ricans' rights as domestic workers; (2) the individual's right to employment is not readily vindicated by post-hoc remedies, and the individuals whose rights are at issue are peculiarly unable, owing primarily to separation from the mainland, to pursue contractual or complaint remedies on their own; and (3) the relief sought does not run contrary to federal objectives or interfere with the federal regulatory scheme. Thus, in the Secretary's view, this ability to sue as *parens patriae* when the issues involved are the rights of U.S. workers and access to the employment service system, would not extend to all states. Rather, Puerto Rico's standing argument is based on its unique circumstances. Furthermore, granting standing to Puerto Rico in these limited circumstances in no way suggests any broader standing rights against any agency of the United States government or any other state. As the Commonwealth recognizes in its brief, a state's assertion of standing to sue another sovereign must be closely scrutinized and is extremely difficult to main-

tain, particularly against the Federal government (Br. 13, 27-28, and cases cited at Br. 28 n. 23), and against other states as well (Br. 30-32).

In sum, the Commonwealth's asserted interest in protecting its right to full participation in the United States Employment Service System neither infringes on nor is inconsistent with federal interests. Furthermore, the allegations in the Commonwealth's complaint go beyond individual claims of mistreatment which may be handled through the employment service complaint system, and involve allegations of systemic mistreatment of Puerto Rican workers. Finally, Puerto Rican workers are peculiarly unable, primarily because of their separation from the mainland, to seek contractual or complaint remedies. In these circumstances, the Secretary of Labor is of the view that federal policy considerations do not weigh against granting Puerto Rico standing to sue as *parens patriae.*

CONCLUSION

For the foregoing reasons, the Secretary of Labor would not object to this Court's granting Puerto Rico standing as *parens patriae* to seek equitable relief from an alleged pattern of misconduct by private parties toward Puerto Rican workers.

Respectfully submitted.

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April 1981

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I certify that copies of the Secretary's brief have been served this day, by mail, upon counsel at the addresses listed below:

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No. 80-1305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALFRED L. SNAPP & SON, INC., *et al.*,
Petitioners,

v.

COMMONWEALTH OF PUERTO RICO
On the relation of
PEDRO BAREZ, SECRETARY, DEPARTMENT OF
LABOR AND HUMAN RESOURCES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

Whether the Commonwealth of Puerto Rico has standing as *parens patriae* to sue 32 Virginia apple growers for alleged breaches of employment contracts with Puerto Rican workers and alleged violations of federal statutes and regulations where

(a) only a small number of Puerto Rican workers (at most 787) were harmed by the alleged actions of the Virginia growers,

(b) the impact of the alleged wrongs upon the general economy of Puerto Rico was slight,

(c) the lawsuit constitutes an aggregation of individual claims that the Puerto Rican workers may have against the Virginia growers, and

(d) the Puerto Rican workers allegedly aggrieved have adequate remedies and have clearly demonstrated their ability to pursue those remedies.

PARTIES TO THE PROCEEDING

Alfred L. Snapp & Son, Inc.
Alfred L. Snapp, Sr.
John T. Watt & Son, a corporation,
d/b/a Timber Ridge Fruit Farm
John T. Watt, Jr.
Orchard Management Co., Inc.
Harry F. Byrd, III
D.K. Russell and Sons, Inc.
J. Robert Russell
Whitman Orchards
Gordon T. Whitman
Robert Boyd, a corporation, t/a Cloverdale Farm
Robert J. Boyd
The C.L. Robinson Corp.
Delmar Robinson, Jr.
R & T Packing Corp.
C. Robert Solenberger
E. Blackburn Moore
Fred L. and Philip B. Glaize,
d/b/a Crescent Orchards
Fred L. Glaize, Jr.
Philip B. Glaize
Frederick Farms
James R. Robinson
George B. Whitacre
H. F. & T. B. Byrd
John E. Crumpacker
H.F. Byrd
T.B. Byrd
Harvey Brumback
James Clevenger
McDonald Farms
James Kenneth McDonald
Messick & Beaver
Albert W. Messick
James Beaver

Frank L. Snapp and Elmer G. Snapp,
d/b/a/ H.T. Snapp & Sons
Frank L. Snapp
Elmer G. Snapp
R. Roland Snapp
Robert E. Wyatt
Stanley Bauserman
Stewart Bell
Henry Brumback
Woodside Farm
John W. Smith
William S. Franklin
Wayne McInturff
James B. Swing
George Cather
Garland R. Cather
Irvin R. King
Albert W. Messick
C.H. Jones Orchards

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., pp. A16-A26) is reported at 632 F.2d 365 (4th Cir. 1980). The opinion of the district court (Pet. App., pp. A1-A15) is reported at 469 F.Supp. 928 (W.D.Va. 1979).

JURISDICTION

The court of appeals entered its judgment on October 9, 1980 and issued its order denying the petitioners'

timely petition for rehearing on December 16, 1980 (Pet. App., p. A27). The petition for a writ of certiorari was filed on February 2, 1981 and was granted on November 30, 1981. The jurisdiction of the Court rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1503 (1976), and the Wagner-Peyser Act, 29 U.S.C. §§ 49-49k (1976). The administrative regulations principally involved are the temporary foreign labor certification process regulations, 20 C.F.R. Part 655 (1978), and the Wagner-Peyser Act regulations, 29 C.F.R. Parts 653 and 658 (1978). The pertinent provisions of these statutes and regulations are set forth at Pet. App., pp. A28-A57.

STATEMENT OF THE CASE

This action grew out of the events surrounding the 1978 apple harvest in the Commonwealth of Virginia. In the spring of that year, the petitioners, 32 apple growers located in the area of Winchester, Virginia, applied to the U.S. Department of Labor for certification of their needs for temporary foreign labor, anticipating that, as in prior years, they would not be able to recruit sufficient U.S. workers to harvest their apples.

Following the 1978 apple harvest, on January 11, 1979, the Commonwealth of Puerto Rico filed a complaint in the United States District Court for the Western District of Virginia against the 32 Virginia apple growers.[1] The Commonwealth sued in its capacity as *parens patriae* on behalf of, at most, 787 Puerto Rican workers who had allegedly accepted employment picking apples for the 32 Virginia growers during the 1978 apple harvest. The Commonwealth sought a declaratory judgment that each

[1] The complaint also named 19 officers, partners, or employees of the 32 apple growers.

of the 32 Virginia growers had breached the terms of his contracts with his Puerto Rican workers and had violated certain federal statutes and regulations. The Commonwealth also sought a permanent injunction against future violations by the 32 Virginia growers.

On April 19, 1979, Judge Turk of the Western District of Virginia held that the Commonwealth lacked standing as *parens patriae* to prosecute the action since neither the segment of the Commonwealth's population nor the injury to the Puerto Rican economy was of sufficient magnitude to confer *parens patriae* standing and since the Puerto Rican workers allegedly aggrieved were in fact actually litigating the same issues in other forums. On October 9, 1980, a divided panel of the United States Court of Appeals for the Fourth Circuit reversed the district court and held that the Commonwealth did have *parens patriae* standing.

The federal statutory and regulatory framework. Two separate statutory and regulatory schemes are involved in the admission of temporary foreign agricultural labor. The Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503 (1976), regulates the admission of aliens into the United States. 8 U.S.C. §§ 1101(a)(15)(H)(ii) and 1184(c) provide for the admission into the United States of temporary foreign workers when enough qualified unemployed United States workers are not available. The Attorney General of the United States has delegated the responsibility for this determination to the Commissioner of Immigration and Naturalization, 8 C.F.R. § 2.1 (1978), and he, in turn, has delegated to the U.S. Secretary of Labor the initial responsibility for determining whether enough qualified United States workers are available to fill a particular job and whether the admission of temporary foreign workers will adversely affect United States workers. 8 C.F.R. § 214.2(h)(3)(1978).

The U.S. Secretary of Labor has promulgated regulations prescribing the standards under which he will cer-

tify an employer's need to hire temporary foreign workers. 20 C.F.R. Part 655 (1978). These regulations provide that an employer who anticipates a labor shortage may request a labor certification for temporary foreign workers by filing an application with a local office in the area of intended employment. 20 C.F.R. § 655.201(a)(1) (1978). Each temporary labor certification application must include a copy of the job offer which will be used by the employer for the recruitment of both U.S. and foreign workers. 20 C.F.R. § 655.201(b)(1)(1978). The job offer must contain the minimum terms and conditions set forth at 20 C.F.R. § 655.202 (1978). The temporary labor certification application and accompanying job offer must be filed with the local office early enough to allow the state agency to attempt to recruit U.S. workers locally and through the U.S. Employment Service's intrastate and interstate clearance system for 60 calendar days prior to the employer's estimated date of need. 20 C.F.R. §§ 655.201(c) and 655.205 (1978).

The interstate clearance system is a national system of public employment offices administered through the U.S. Employment Service established by the Wagner-Peyser Act, 29 U.S.C. §§ 49-49k (1976). The purpose of the system is to provide a no-fee labor exchange, whereby employers located in sections of the country where there are too few workers can be brought together with qualified workers from other areas who are seeking employment. 20 C.F.R. § 653.108(b)(1)(1978). The U.S. Secretary of Labor has promulgated rules and regulations to carry out the provisions of the Wagner-Peyser Act, pursuant to the authority vested in him by the Act. 29 U.S.C. § 49k; 20 C.F.R. Part 653 (1978). Generally, an agricultural employer desiring to utilize the interstate clearance system must submit a job offer which meets certain specified minimum requirements. 20 C.F.R. § 653.108(c), (d) (1978). While similar in many respects, the requirements imposed by the temporary foreign labor certifica-

tion regulations are more stringent than those imposed by the Wagner-Peyser regulations. *Compare* 20 C.F.R. § 655.202(b) (1978) *with* 20 C.F.R. § 653.108(c) (1)-(5) (1978). Use of the interstate clearance system is voluntary except for those employers who seek certification for temporary foreign agricultural labor.

The temporary foreign labor certification regulations provide that, if the U.S. Department of Labor has probable cause to believe that an employer has not lived up to the terms of his temporary foreign labor certification, the U.S. Department of Labor shall investigate the matter. 20 C.F.R. § 655.210(a) (1978). If the U.S. Department of Labor concludes that the employer has not complied with the terms of the temporary foreign labor certification, the employer may not be eligible to apply for a temporary foreign labor certification in the coming year. *Id.* The employer may request a hearing, however, in which case the procedures set forth at 20 C.F.R. Part 658 Subpart E (1978) are to be followed. 20 C.F.R. § 655.210(a) (1978). The Employment Service Complaint System also applies to any employee complaints alleging that an employer has violated Employment Service regulations. 20 C.F.R. § 658.501 (1978).

Puerto Rico P.L. 87. Over the years, referral of Puerto Rican workers to East Coast apple growers such as the Virginia apple growers has been complicated by the existence of a law unique among the states participating in the interstate clearance system, Puerto Rico Public Law 87, 29 L.P.R.A. §§ 526 *et seq.* (1966), as amended. P.L. 87 requires any mainland employer seeking to hire Puerto Rican workers to first enter into a contract with the Commonwealth Secretary of Labor and Human Resources. Failure to do so subjects the grower to possible criminal and civil penalties. Because P.L. 87 imposes terms and conditions of employment more onerous and burdensome than those imposed by the Wagner-Peyser Act and the Immigration and Nationality Act, two courts have held

that Puerto Rican workers could not be considered "available" within the meaning of the Immigration and Nationality Act as long as the special conditions placed on their employment by P.L. 87 remained in effect. *See Hernandez Flecha v. Quiros* 567 F.2d 1154 (1st Cir. 1977), *cert. denied,* 436 U.S. 945 (1978), and *Galan v. Dunlop,* 411 F. Supp. 268 (D.D.C. 1975), *appeals dismissed as moot and remanded with order to vacate sub. nom. Galan v. Usery,* Nos. 76-1018 and 76-1019 (D.C. Cir. 1977) (unpublished).

As a result of the First Circuit's decision in *Flecha v. Quiros, supra,* the U.S. Department of Labor took the position, when the 32 Virginia apple growers filed their 1978 job offers, that the job offers would not be circulated to Puerto Rico. After this Court denied certiorari in *Flecha v. Quiros* on June 5, 1978, 436 U.S. 945 (1978), the legislature of Puerto Rico approved an amendment to P.L. 87 which became effective on July 13, 1978 (J.A. 32-36). This amendment authorized the Commonwealth Secretary of Labor and Human Resources to exempt prospective employers from P.L. 87 under certain conditions. The U.S. Department of Labor subsequently forwarded the job offers of the 32 Virginia apple growers to Puerto Rico on August 2, 1978, less than two weeks before the Virginia apple growers were supposed to be "certified" regarding their needs for temporary foreign workers. Second Amended Complaint for Declarative and Injunctive Relief (hereinafter referred to as "Complaint") ¶ 63 (J.A. 17). The last minute recruitment efforts ultimately produced names of approximately 787 Puerto Rican workers allegedly interested in picking apples for the 32 Virginia apple growers in 1978.[2] Complaint ¶ 65 (J.A. 18-20).

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[2] The Virginia apple growers together with other apple growers and apple grower associations filed suit in the United States District Court for the Western District of Virginia challenging the propriety of the exemption from P.L. 87 and the referral of Puerto Rican workers. The district court granted the requested prelimi-

The complaint. The Commonwealth's complaint named 51 defendants, 32 apple growers and 19 officers, partners or employees of those apple growers. Complaint ¶¶ 5-55 (J.A. 3-13). The complaint alleged that 787 Puerto Rican workers had made firm commitments to work for one of the 32 Virginia apple growers. Complaint ¶ 65 (J.A. 18-20).

Only 420 Puerto Ricans actually arrived at the Virginia orchards, and approximately 30 still had employment three weeks later. Complaint ¶ 64 (J.A. 17-18). The remainder never left Puerto Rico allegedly "because of oral advice from the United States Department of Labor requesting cancellation of remaining flights." Complaint ¶ 64 (J.A. 17). The complaint alleged that the Virginia apple growers violated the contractual, statutory and regulatory rights of certain Puerto Rican workers (1) by failing to provide them with employment, (2) by subjecting them to work conditions more burdensome than those established for temporary foreign workers, or (3) by improperly terminating their employment. Complaint ¶¶ 72, 74 and 76 (J.A. 27-29).

First, as to the failure to employ, the complaint alleged two distinct types of violations. The complaint alleged that certain Puerto Rican workers had accepted employment from 10 of the Virginia growers and were instructed to depart from San Juan Airport on September 5, 1978. Complaint ¶ 66 (J.A. 20-22). These workers never arrived at the orchards because "their departure for the mainland United States was cancelled upon oral advice by the Office of the Solicitor, United States Department of Labor, to plaintiff Quiros that certain grow-

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nary injunction. *Frederick County Fruit Growers Association, Inc., et al. v. F. Ray Marshall, et al.*, Civ. No. 78-0086(H) (W.D. Va., filed August 31, 1978), *appeals dismissed as moot and remanded*, 594 F.2d 857 (4th Cir. 1978) (unpublished). On June 16, 1980, the district court dismissed the case on the grounds of mootness. (Unpublished opinion.)

ers had refused to employ individuals recruited by the Puerto Rican Employment Service and referred from Puerto Rico." *Id.* (J.A. 22). The complaint also alleged that certain Puerto Rican workers presented themselves for employment at the orchards of eight Virginia growers and were denied employment.[3] Complaint ¶ 67 (J.A. 22-23).

Secondly, the complaint alleged that 28 of the Virginia growers had "improperly terminated" some of their Puerto Rican workers "for no stated reason, or on one or more of the following pretexts invoked by the defendants herein: (a) allegedly no work available; (b) alleged inability to pick sufficient quantities of apples; (c) allegedly picked damaged fruit; (d) allegedly no social security card." Complaint ¶¶ 68 and 69 (J.A. 23-25).

Thirdly, the complaint alleged that 28 of the Virginia growers subjected some of their Puerto Rican workers

> to one or more of the following work conditions, where Jamaicans were not subjected to such conditions:
>
> a. Inadequate or no training;
>
> b. Poor or unsanitary camp conditions;

---

[3] Of the 10 growers charged with refusing to hire the Puerto Rican workers whose departure for the mainland was cancelled "upon oral advice of the Office of the Solicitor," only *one* allegedly refused to hire Puerto Rican workers who presented themselves at the orchards. *Compare* Complaint ¶ 66 (J.A. 20-22) *with* Complaint ¶ 67 (J.A. 22-23). Thus, nine of the 10 growers listed in Complaint ¶ 66 were charged with failing to hire Puerto Rican workers even though they never refused to hire Puerto Rican workers who presented themselves at their orchards. In fact, the only allegation against four of the growers named in the complaint, *e.g.*, Robert Boyd T/A Cloverdale Farm, C.L. Robinson Corp., R.&T. Packing Corp., and George Whitacre, is that the flights of their scheduled workers were cancelled upon oral advice of the U.S. Department of Labor. With respect to these four growers, there are no allegations that they imposed more burdensome conditions or that they improperly terminated Puerto Rican workers.

c. Inadequate food;

d. Hired to pick apples but instructed to pick pears or other items (*e.g.*, peaches, weeds), or instructed to perform other types of work (*e.g.*, packing);

e. Required to pick apples that were noticeably smaller than apples Jamaicans were allowed to pick (thus, requiring longer time to fill bin);

f. Required to spot-pick after Jamaicans had been permitted to strip-pick;

g. Required to pick from top of tree after Jamaicans permitted to pick at bottom of tree;

h. Inadequate medical facilities and treatment;

i. Not fully paid for work performed;

j. Jamaicans permitted to start work at an earlier hour than Puerto Ricans;

k. Jamaicans permitted to work on Saturday and/or Sunday and Puerto Ricans were not;

l. Required to work on Sunday when did not want to for religious reasons;

m. Not given as many boxes to fill as Jamaicans;

n. Not given any, or sufficient number of, numbered stickers needed to affix to boxes after apples picked, in order to identify work product;

o. Required to fill a bin that belonged to a Jamaican; and

p. Subjected to verbal abuse or threatened to be fired.

Complaint ¶ 70 (J.A. 25-26).

The complaint requested a declaratory judgment that the Virgina apple growers had "breached the terms of

their contracts with named migrant Puerto Rican farm workers" and had violated various federal statutes and regulations, namely the Wagner-Peyser Act, the Immigration and Nationality Act, and the regulations promulgated pursuant to those acts. Complaint, pp. 30-31 (J.A. 30-31). The complaint also requested the district court to permanently enjoin the Virginia growers from violating the federal statutes and regulations in the future. Complaint, p. 31 (J.A. 31).

The district court's decision. On February 15, 1978, the Virginia growers filed a motion to dismiss the Commonwealth's complaint on the grounds that (1) the Commonwealth lacked standing to prosecute the action, (2) the Commonwealth was not the real party in interest within the meaning of Rule 17(a) of the Federal Rules of Civil Procedure, (3) the district court lacked jurisdiction over the subject matter of the suit, (4) the Commonwealth failed to join the affected Puerto Rican migrant farm workers who were indispensable parties for just adjudication of the suit, and (5) the Commonwealth's complaint failed to state a cause of action upon which relief could be granted.

After hearing oral argument on the motion to dismiss, the district court on April 19, 1979 entered a memorandum opinion and order dismissing the Commonwealth's complaint with prejudice on the ground that the Commonwealth lacked standing as *parens patriae* to prosecute the action. 469 F. Supp. 928 (W.D. Va. 1979) (Pet. App. A1-A15). The district court identified the quasi-sovereign interest asserted by the Commonwealth as "an interest in the protection and preservation of its general economy." 469 F. Supp. at 932 (Pet. App. A9). Based on its analysis of the leading *parens patriae* decisions, the district court identified "three crucial factors which influence the decision to grant or deny [*parens patriae*] standing: the size of the segment of the population that has been adversely affected, the magnitude of the harm

inflicted, and the practical ability of those injured to obtain complete relief." *Id.* (Pet. App. A9). The district court then stated that "it has been emphasized that the State must be seeking to represent a significant portion of its population." *Id.* (Pet. App. A10). The district court also observed that it must "determine whether the adverse conditions flowing from the challenged conduct are sufficiently severe and widespread as to constitute a wrong against the public interest." *Id.* at 933 (Pet. App. A12). Finally, the district court remarked that *parens patriae* status has been consistently denied to state plaintiffs whenever it appeared that the individual citizens were capable of maintaining and prosecuting their own actions for relief." *Id.* at 934 (Pet. App. A13).

Contrasting the allegations in the complaint against the principles outlined above, the district court concluded that the Commonwealth's complaint failed to present a justiciable quasi-sovereign interest sufficient to justify *parens patriae* standing. *Id.* at 934 (Pet. App. A13). The district court based its conclusion, in part, on the fact that neither the segment of the Commonwealth's population nor the injury to the Puerto Rican economy was of sufficient magnitude to confer *parens patriae* standing. *Id.* (Pet. App. A13). The district court pointed out that, at best, only 787 persons out of a total population of 2,712,033 were harmed directly by the alleged activities of the Virginia growers and that the jobs in question were temporary in nature with a maximum duration of two months. *Id.* (Pet. App. A13). The district court also based its conclusion on the fact that the Puerto Rican workers allegedly injured stood ready and willing to vindicate their own rights and were in fact actually litigating the same issues in other forums. *Id.* (Pet. App. A14).

The court of appeals' decision. On October 9, 1980, a divided panel of the Fourth Circuit handed down its decision reversing the district court and holding that the

Commonwealth did have *parens patriae* standing to maintain the action. 632 F.2d 365 (4th Cir. 1980) (2-1 decision; Hall, J., dissenting) (Pet. App. A16-A26). The majority opinion agreed that the district court applied the correct legal standards. The majority opinion stated that "three factors normally determine whether the quasi-sovereign interest is sufficiently important to permit standing: the size of the segment of the population that has been adversely affected, the magnitude of the harm inflicted, and the practical ability of those injured to obtain complete relief without intervention by the sovereign." *Id.* at 369 (Pet. App. A22-A23).

The majority opinion, however, disagreed with the district court's conclusions that the affected Puerto Rican workers could effectively litigate the same issues themselves and that the segment of the population and the injury to the Puerto Rican economy were not of sufficient magnitude to grant *parens patriae* standing. *Id.* (Pet. App. A23). As to the severity of the injury to Puerto Rico's citizenry, the majority opinion concluded that

> [t]he number of farm workers temporarily employed annually does not accurately measure the potential effect of the damaged recruitment efforts on all of Puerto Rico's citizens. The island's officials are coping with an almost unmanageable unemployment problem. Its economy is in dire straits. The morale of the average Puerto Rican citizen under the circumstances can be expected to be extremely low. Deliberate efforts to stigmatize the labor force as inferior carry a universal sting.

Id. at 370 (Pet. App. A24). As to the ability of the Puerto Rican workers to fend for themselves, the majority opinion simply observed that

> [i]t cannot be said with any assurance that they are in positions to litigate these issues effectively. They would, at best, achieve a piecemeal solution of Puerto

> Rico's parens patriae grievances and in the process wastefully consume judicial resources.

Id. (Pet. App. A26).

Judge Hall, the dissenting judge, concluded that the district court applied the proper legal standards and "properly considered the number of people affected by the Growers' alleged activities, the potential economic impact, and the ability of the workers to litigate their own claims." *Id.* at 370-371 (Pet. App. A26).

The Virginia growers filed a petition for rehearing and suggestion for rehearing in banc with the court of appeals on November 24, 1980. The court of appeals denied the petition for rehearing on December 16, 1980 (Pet. App. A27). The Virginia growers filed a petition for writ of certiorari with this Court on February 2, 1981. The petition for writ of certiorari was granted by this Court on November 30, 1981.

The related lawsuit. At the same time the Commonwealth filed its complaint in this case, it also filed a complaint in the United States District Court for the Southern District of New York against 55 persons engaged in the business of growing apples in the State of New York. *Commonwealth of Puerto Rico on the relation of Carlos S. Quiros v. Bramkamp*, Civil No. 79-0199 (S.D.N.Y., filed January 12, 1979). The complaint in the New York case was virtually identical to the complaint in this case, the parties filed equivalent briefs, but no hearing was held. Following the lead of Judge Turk of the Western District of Virginia, Judge Kevin T. Duffy filed a memorandum endorsement on September 28, 1979, granting the New York apple growers' motion to dismiss. The memorandum stated simply that:

> For the reasons stated in the decision of Judge James Turk in the related case of *Commonwealth of Puerto Rico, etc. v. Alfred L. Snapp & Son, Inc., et al.*, 469 F. Supp. 928 (W. D. Va. 1979), the within motion to dismiss this action is granted.

On July 28, 1981, the Second Circuit reversed the district court and held that the Commonwealth did have standing as *parens patriae* to prosecute the action. *Commonwealth of Puerto Rico ex rel. Quiros v. Bramkamp*, 654 F.2d 212 (2d Cir. 1981). A petition for writ of certiorari was filed with this Court on August 20, 1981 and is now pending. 50 U.S.L.W. 3302 (Aug. 20, 1981) (No. 81-361).

SUMMARY OF ARGUMENT

The quasi-sovereign interest asserted by the Commonwealth in this case, its interest in the health of its general economy, is deemed sufficiently implicated to support *parens patriae* standing only if the injury alleged affects the general population of the state in a substantial way. *Maryland v. Louisiana*, —— U.S. ——, 101 S.Ct. 2114 2124, 68 L.Ed.2d 576, 590 (1981). It is clear that relatively few residents of Puerto Rico were harmed directly by the alleged activities of the defendant growers (at best, only 787 Puerto Ricans out of a total population of 2,712,033). The court of appeals chose to focus on the "magnitude and pervasiveness of the societal harm" rather than the small number of Puerto Rican workers directly affected. In attempting to establish an effect beyond the number of migrant farm workers employed annually, the court of appeals cited the unmanageable unemployment problem in Puerto Rico and the low morale of the average Puerto Rican citizen, both of which bear at most a tenuous relationship to the alleged violations by the defendant growers. The impact of the challenged actions on the average Puerto Rican citizen is simply too vague, speculative and remote to justify *parens patriae* standing. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44 (1976).

Furthermore, it is settled doctrine that a state does not have standing to sue as *parens patriae* if it is merely litigating as a volunteer the personal claims of its citizens. The complaint makes clear that this lawsuit constitutes nothing more than an aggregation of individual claims that an indeterminate number (not exceeding 787) of Puerto Ricans *may* have against 32 individual Virginia apple growers. The complaint seeks a declaratory judgment that the Virginia growers breached the terms of their contracts with the Puerto Rican farm workers. The individual nature of these employment disputes is clearly reflected in the assortment of allegations against the Virginia growers. The nature of the employment disputes would vary from worker to worker and employer to employer, with the validity of each Puerto Rican's complaint depending on the facts and circumstances of his individual case. Thus, this case represents an attempt by the Commonwealth to litigate as a volunteer the personal claims of a mere handful of its citizens in the guise of a *parens patriae* lawsuit. *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976).

Finally, *parens patriae* standing is inappropriate in this case because the Puerto Rican workers allegedly aggrieved have adequate remedies available to them and have clearly demonstrated their ability to pursue those remedies. *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976). A number of the Puerto Rican workers have brought individual suits against some of the Virginia apple growers, while others have brought purported class actions against the growers. In addition, the U.S. Department of Labor's Employment Service Complaint System is available to investigate and resolve employee complaints that an employer has violated Employment Service regulations. Only by refusing to acknowledge the numerous lawsuits already brought by the Puerto Rican workers could the court of appeals have concluded that those workers were not in positions to litigate the issues effectively. Allowing the Commonwealth to sue as *parens*

patriae would merely duplicate existing litigation and possibly involve the federal courts in private employment disputes on a continuing basis.

ARGUMENT

The Commonwealth of Puerto Rico Lacks the Requisite Quasi-Sovereign Interest to Justify Parens Patriae Standing Where a Small Number of Puerto Ricans Were Harmed by the Alleged Activities of the Apple Growers, the Impact of the Alleged Wrongs Upon the General Economy of Puerto Rico Was Slight, and the Affected Puerto Rican Workers Are Able to Vindicate Their Own Rights.

A divided court of appeals reversed the district court and held that the Commonwealth of Puerto Rico had standing as *parens patriae* to sue 32 Virginia apple growers on behalf of, at most, 787 Puerto Rican workers for alleged breaches of employment contracts and alleged violations of certain federal statutes and regulations. The basic areas of disagreement between the court of appeals and the district court were whether the segment of the population affected and the injury to the Puerto Rican economy were of sufficient magnitude to grant *parens patriae* standing and whether the affected Puerto Rican workers could effectively litigate the same issues themselves. In reversing the district court, the court of appeals misapplied applicable case law which sets forth the standards for *parens patriae* standing.

A. *The Injuries Alleged Did Not Affect the General Population of Puerto Rico in a Substantial Way.*

A state seeking to act in the capacity of *parens patriae* must assert a "quasi-sovereign" interest. *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 (1972). The quasi-sovereign interest asserted by the Commonwealth of Puerto Rico in this case "arises from the interest of

the Commonwealth in the health of its general economy."[4] *Commonwealth of Puerto Rico, Etc. v. Alfred L. Snapp & Son, Inc.*, 469 F.Supp. 928, 932 (W.D.Va. 1979) (Pet. App. A8); *Commonwealth of Puerto Rico v. Alfred L. Snapp & Son, Inc.*, 632 F.2d 365, 368 (4th Cir. 1980) (Pet. App. A21).

The mere assertion by a state that a challenged activity seriously affects its general economy, however, is not determinative of the question of whether the state has a justiciable interest in the litigation so as to confer *parens patriae* standing. *See Oklahoma v. Cook*, 304 U.S. 387, 393-94 (1938); *Oklahoma v. Atchinson, T. & S. F. R. Co.*, 220 U.S. 277, 288-89 (1911). This Court has often stated—a fact acknowledged by both the district court and the court of appeals in this case—that a state's quasi-sovereign interest will be deemed sufficiently implicated to support *parens patriae* standing only if "the injury alleged affects the general population of a state in a substantial way." *Maryland v. Louisiana*, —— U.S. ——, 101 S. Ct. 2114, 2124, 68 L.Ed. 2d 576, 590 (1981); *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 450 (1945); *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901).[5] *See also Commonwealth of Puerto Rico*

[4] This case, involving as it does an alleged injury to the general economy of the Commonwealth of Puerto Rico, differs substantially from *parens patriae* cases involving interstate public nuisances where it can be said that the state's *parens patriae* standing is based on the state's "interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Georgia v. Tennesee Copper Co.*, 206 U.S. 230, 237 (1907). *Cf. Commonwealth of Pennsylvania, by Shapp v. Kleppe*, 533 F.2d 668, 675 n. 42 (D.C. Cir. 1976).

[5] Although most of this Court's decisions dealing with the right of a state to sue as *parens patriae* have been made in the context of suits between states brought pursuant to the original jurisdiction of this Court, the basic principles of *parens patriae* standing discussed in those cases have application to suits brought by a

ex rel. Quiros v. Bramkamp, 654 F.2d 212, 215 (2d Cir. 1981); *Commonwealth of Puerto Rico v. Alfred L. Snapp & Son, Inc.*, 632 F.2d 365, 369-70 (4th Cir. 1980) (Pet. App. A23); *Commonwealth of Pennsylvania, by Shapp v. Kleppe*, 533 F.2d 668, 674-75 (D.C. Cir. 1976); *Prince George's County, Md. v. Levi*, 79 F.R.D.1, 4 (D.Md. 1977); *Commonwealth of Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center*, 356 F. Supp. 500, 505 (E.D. Pa. 1973); and *Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, 160 F. Supp. 387, 389 (E.D.La. 1958).

Implicit in the requirement that the injury alleged must substantially affect the general population of a state to justify *parens patriae* standing is that the impact on the general population must be demonstrated by some quantitative manner. For example, in *Maryland v. Louisiana*, —— U.S. ——, 101 S. Ct. 2114, 2125, 68 L.Ed.2d 576, 591 (1981), the Court pointed out that "a great many citizens in each of the plaintiff States are themselves consumers of natural gas and are faced with increased costs aggregating millions of dollars per year"; in *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923), the Court noted that "a substantial portion of the State's population," approximately 1,500,000 citizens of Pennsylvania and 3,625,000 citizens of Ohio, were "seriously jeopardized" by the threatened cessation of oil deliveries from West Virginia; in *Missouri v. Illinois*, 180 U.S. 208, 241 (1903), the Court noted that not only would the large communities located on the Mississippi

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state against a citizen of another state at the district court level. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-60 (1972). *See also Commonwealth of Puerto Rico ex rel. Quiros v. Bramkamp*, 654 F.2d 212, 215 n. 4 (1981); *Comonwealth of Pennsylvania, by Shapp v. Kleppe*, 533 F.2d 668, 675 (D.C. Cir. 1976); *Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11, 22-23 n.26 (3rd Cir. 1975); *State of California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973); and *Commonwealth of Puerto Rico, Etc. v. Alfred L. Snapp & Son, Inc.*, 469 F. Supp. 928, 932 n.1 (W.D. Va. 1979) (Pet. App. A9).

River be affected by the discharge of sewerage from Illinois but that the economic repercussions would "injuriously affect the entire state." [6]

In this case, as the district court pointed out, "it is clear that relatively few residents of Puerto Rico were harmed directly by the alleged activities of defendants. At best, only 787 persons out of a total population of 2,712,033 were so affected." 469 F. Supp. at 934 (Pet. App. A13). The district court concluded that "this segment of the population falls far below the 'substantial majority' suggested by some courts." *Id.* The 787 Puerto Ricans allegedly referred to the 32 Virginia growers in 1978 comprised less than three-hundredths of one percent (0.03%) of Puerto Rico's 1970 population. Even if all 2,318 Puerto Ricans allegedly referred to all East Coast apple growers in 1978 were deemed affected by the alleged actions of the 32 Virginia growers, that number constituted less than one-tenth of one percent (0.1%) of Puerto Rico's 1970 population.[7] The Commonwealth in-

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[6] *See also Hawaii v. Standard Oil Co.*, 301 F. Supp. 980 (D. Hawaii 1969), *rev'd on other grounds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd on other grounds*, 405 U.S. 251 (1972) (district court noted that actions of private defendants would affect a substantial number of Hawaii's citizens since Hawaii's 800,000 inhabitants owned 300,000 motor vehicles); *Washington Utilities & Transportation Commission v. F.C.C.*, 513 F.2d 1142, 1152 (9th Cir. 1975) (court of appeals noted that a substantial portion of Washington's citizens would be affected by increase in intrastate telephone rates); *Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, 160 F. Supp. 387, 389 (E.D. La. 1958) (three-judge court held that interests of dairy industry do not affect whole economy or all the people of the state).

[7] In 1976, a total of 613 Puerto Rican workers were employed by all East Coast apple growers. Complaint ¶ 61 (J.A. 16-17). In 1977 only 93 Puerto Rican workers were referred to the East Coast apple growers. *Id.* In 1978, the numbers were swollen by a unique U.S. Department of Labor program that provided over $275,000 in Comprehensive Employment and Training Act (CETA) funds to transport the Puerto Ricans to the mainland. A report

formed the court of appeals that only 4,284 Puerto Rican workers were employed annually on *all* mainland United States farms in 1977, Appellant's Brief, at 27 n.57, a number which constitutes less than two-tenths of one percent (0.2%) of Puerto Rico's 1970 population.

Since few Puerto Ricans were involved in the 1978 Virginia apple harvest, it is difficult to comprehend how the alleged actions of the 32 Virginia growers could have affected either directly or indirectly a "substantial portion" of Puerto Rico's citizenry. In sharp contrast to the district court, the court of appeals did not even address these numbers.[8] The court of appeals sidestepped this issue, claiming that "the number of farm workers temporarily employed annually does not accurately measure the potential effect of the damaged recruitment efforts on all of Puerto Rico's citizens." 632 F.2d at 370 (Pet. App. A24). Instead, the court of appeals observed, "[i]t is the magnitude and pervasiveness of the societal harm that must be weighed—not the directness of the injury to particular individuals." *Id.* (Pet. App. A25). The court of appeals therefore focused on the fact that "the island's officials are coping with an almost unmanageable unemployment problem. Its economy is in dire straits. The morale of the average Puerto Rican citizen under the circumstances can be expected to be extremely low. Deliberate efforts to stigmatize the labor force as inferior carry a universal sting." *Id.* (Pet. App. A24). The court

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on the use of these funds is found in Report by the Comptroller General of the United States to Senator Robert C. Byrd, "Recruiting and Placing Puerto Rican Workers With Growers During the 1978 Apple Harvest Were Unsuccessful," HRD 80-45 (GAO, February 14, 1980).

[8] There is no mention in the court of appeals' opinion of the number of Puerto Rican workers referred to Virginia apple growers in 1978 (787) or the number of Puerto Rican workers who actually arrived at the Virginia orchards in 1978 (420), even though these numbers appear in the complaint. Complaint ¶¶ 64-65 (J.A. 17-20).

of appeals concluded that "[t]he apparent inability of the United States government, through the Department of Labor, to grant Puerto Ricans equal treatment with other citizens or even with foreign temporary workers must certainly have an effect which permeates the entire island of Puerto Rico." *Id.* (Pet. App. A25).

The court of appeals' attempt to rationalize how a substantial portion of Puerto Rico's citizens could have been affected by the alleged actions of the 32 Virginia growers falls short in several respects. First, the court of appeals disregarded as irrelevant "the number of farm workers temporarily employed annually" claiming that it did "not accurately measure the potential effect of the damaged recruitment efforts on all of Puerto Rico's citizens." 632 F.2d at 370 (Pet. App. A24). In its efforts to establish an effect beyond the number of farm workers temporarily employed annually, however, the court of appeals assumed certain facts not even alleged in the complaint. For example, the court of appeals referred to "deliberate efforts to stigmatize the labor force as inferior" and "the apparent inability of the United States government, through the Department of Labor, to grant Puerto Ricans equal treatment with other citizens or even with foreign temporary workers," 632 F.2d at 370 (Pet. App. A24-A25), even though no such allegations or suggestions are contained in the complaint. The court of appeals also stated that "the complaint alleges irreparable harm . . . to citizens in Puerto Rico who do not intend to migrate," *id.* (Pet. App. A25), even though the complaint clearly states that this lawsuit was intended for the benefit of "migrant Puerto Rican farm workers" interested in working for the defendant Virginia apple growers. Complaint ¶ 77 (J.A. 29).

Secondly, the court of appeals focused on the "almost unmanageable unemployment problem in Puerto Rico." 632 F.2d at 370 (Pet. App. A24). It is not clear whether the court of appeals meant that all unemployed Puerto

Ricans were affected by the alleged actions of the Virginia growers or that successful prosecution of this litigation against the 32 Virginia growers would substantially alleviate the unmanageable unemployment problem. The unemployment problem in Puerto Rico can no more justify *parens patriae* standing in this case than the financial condition of Pennsylvania could have justified *parens patriae* standing in *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976). If the unemployment rate in Puerto Rico were the determinative factor of whether a substantial portion of Puerto Rico's citizens were affected, the number of Puerto Rican workers directly affected would be immaterial. Such reasoning would allow the Commonwealth to claim *parens patriae* standing whenever a solitary Puerto Rican worker has an employment dispute with a mainland employer in which discrimination is alleged. In light of the Commonwealth's expressed intention "to use this power vigorously to protect its migrant workers involved in the harvest of other crops as well," 469 F. Supp. at 934 (Pet. App. A14), Transcript of March 7, 1979 Hearing, at 21, this is not as fanciful a notion as it may appear.

Finally, the court of appeals apparently concluded that actions of the 32 Virginia apple growers somehow adversely affected the already low "morale of the average Puerto Rican citizen." 632 F.2d 370 (Pet. App. A24). Here the court of appeals engaged in the kind of "unadorned speculation" that this Court cautioned against in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44 (1976). Nothing in the record would permit the court of appeals to conclude that the events of 1978 affected the "morale of the average Puerto Rican citizen." Even if the Commonwealth were granted *parens patriae* standing and were to prove all its allegations against the 32 Virginia apple growers in this case, the only Puerto Ricans who might benefit would be those migrant agricultural workers interested in picking

apples for those 32 Virginia growers in the future. Even if Puerto Ricans were to fill every position available, the total number so employed would constitute an insignificant portion of Puerto Rico's population and would not appreciably dent the unemployment rate in Puerto Rico. Whether the filling of every available position with Puerto Ricans would elevate the "morale of the average Puerto Rican citizen" would be pure speculation.[9]

The tenuous reasoning of the court of appeals in this case bears a close similarity to the line of argument rejected by the court in *Commonwealth of Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center*, 356 F. Supp. 500 (E.D. Pa. 1973). In that case, the Commonwealth of Pennsylvania attempted to sue as *parens patriae* on behalf of a woman who had been fired by the defendant allegedly for publishing her criticism of patient care and conditions at the Center; the Commonwealth of Pennsylvania claimed an interest in the matter because of its "affirmative obligation to protect free speech and assure the adequate flow of ideas and information including the flow of information critical of state or state-supported facilities for the mentally ill." *Id.* at 505. The district court stated that

> Any chilling of any individual's freedom of speech is bound to result in pernicious side effects, including an increased timidity on the part of other persons in similar positions and a decrease in the flow of certain kinds of information or opinion. This is one of the many reasons why any deprivation of rights

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[9] *Cf. Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44-45 (1976) (". . . indirectness of injury, while not necessarily fatal to standing, 'may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendant's actions, or that prospective relief will remove the harm.'. . Respondents have failed to carry this burden. Speculative inferences are necessary to connect their injury to the challenged actions of petitioners."

> guaranteed by the First Amendment must be carefully scrutinized and quickly remedied. However, merely because more than one Pennsylvanian may have been indirectly affected by Mrs. Rafferty's firing does not mean that Mrs. Rafferty's injury is an injury to all. Deprivations of an individual's First Amendment rights, whatever the secondary consequences, normally constitute an injury only to the individual. Neither existing law nor sound policy justifies viewing the deprivation of one person's freedom of expression as *a fortiori* a deprivation of the constitutional rights of the citizenry at large.

Id. The district court concluded that "the public interest claimed is . . . vague, speculative and remote, too remote to be encompassed by the doctrine of *parens patriae*." *Id.* at 506. By the same token, the impact of the challenged actions in this case on the average Puerto Rican citizen is too vague, speculative and remote to justify *parens patriae* standing.

B. *The Commonwealth Is Attempting to Litigate As a Volunteer the Personal Claims of a Small Group of Its Citizens.*

The Court has declared the "settled doctrine" that a state does not have standing to sue as *parens patriae* if it is "merely litigating as a volunteer the personal claims of citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976); *see also Maryland v. Louisiana*, —— U.S. ——, 101 S. Ct. 2114, 2124, 68 L.Ed.2d 576, 590 (1981); *Oklahoma v. Cook*, 304 U.S. 387, 394 (1938); *Oklahoma v. Atchison, T. & S.F.R. Co.*, 220 U.S. 277, 289 (1911); *Kansas v. Colorado*, 204 U.S. 331, 341 (1907). In the guise of a *parens patriae* lawsuit, the Commonwealth is, in reality, attempting to litigate as a volunteer the personal claims of a mere handful of its citizens.

It is clear from the complaint that this lawsuit constitutes nothing more than an aggregation of individual

claims that an indeterminate number (not exceeding 787) of Puerto Rican workers *may* have against 32 individual Virginia apple growers.[10] The individual nature of these claims is shown by the fact that the complaint seeks a declaration that the 32 Virginia growers "breached the terms of their contracts with named migrant Puerto Rican farm workers." [11] Complaint, at p. 31 (J.A. 30). Each of the 32 Virginia growers submitted an individual clearance order (job offer) for harvest workers in 1978, and the number of workers requested varied from grower to grower. Complaint ¶¶ 5-55 (J.A. 3-13). Each of the 787 Puerto Ricans who allegedly accepted one of these job offers made a commitment to work for a particular grower, Complaint ¶¶ 65-68 (J.A. 18-25), so that each Puerto Rican worker had an employment relationship with only one of the 32 Virginia growers.

The individual and personal nature of the claims is clearly reflected in the assorted allegations against the 32 Virginia growers. Ten of the 32 Virginia growers are charged with failing to provide employment to qualified Puerto Rican migrant farm workers who "never arrived at their intended places of employment" because their departure from Puerto Rico was cancelled "upon oral advice from the U.S. Department of Labor." Complaint ¶¶ 66 and 72 (J.A. 20-22, 27). In fact, that is

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[10] The complaint specifically names only 41 Puerto Rican workers. Complaint ¶¶ 66-68 (J.A. 20-25). The complaint alleges that "the aforementioned United States migrant farm workers and others" were improperly terminated or subjected to more burdensome work conditions. Complaint ¶¶ 69-70 (J.A. 25-26). The complaint does not specify exactly how many of the 787 Puerto Ricans allegedly referred to the 32 Virginia apple growers were improperly terminated or subjected to more burdensome work conditions.

[11] 20 C.F.R. § 653.108(b)(1) (1978) provides that "[n]or does any job order accepted or recruited upon by the E[mployment] S[ervice] constitute a contractual job offer to which the ETA or a State agency is in any way a party."

the only allegation against four of these 10 Virginia growers. Eight of the 32 Virginia growers are charged with denying employment to some Puerto Ricans who presented themselves for employment at the growers' orchards. Complaint ¶¶ 67 and 72 (J.A. 22-23, 27). Seven of those eight growers are also charged with discriminating against other Puerto Ricans, indicating that their alleged failure to hire was not aimed at all Puerto Rican workers. *Compare* Complaint ¶ 67 (J.A. 22-23) *with* Complaint ¶¶ 68, 69, and 70 (J.A. 23-26).

The complaint further alleges that some Puerto Rican workers were terminated unlawfully "for no stated reason, or on one or more of the following pretexts invoked by one or more defendants herein: (a) allegedly no work available; (b) alleged inability to pick sufficient quantities of apples; (c) allegedly picked damaged fruit; (d) allegedly no social security card." Complaint ¶ 69 (J.A. 25). Not every Puerto Rican was illegally terminated since the complaint concedes that approximately 30 Puerto Ricans still had employment three weeks later. Complaint ¶ 64 (J.A. 18). The complaint also alleges that some Puerto Rican workers "were subjected by defendants and their agents and employees to *one or more* of the following work conditions, when Jamaicans were not subjected to such conditions," listing 16 separate conditions. Complaint ¶ 70 (J.A. 25-26). (Emphasis added.)

Thus, the nature of the employment dispute between a particular Puerto Rican worker and his employer varies from worker to worker and employer to employer, and the validity of each Puerto Rican's complaint would depend on the facts and circumstances of his case. For example, several of the "pretexts" allegedly invoked by the growers for terminating their Puerto Rican workers, Complaint ¶ 69 (J.A. 25), would justify the termination of any employee, *i.e.*, alleged inability to pick sufficient quantities of apples or allegedly picked damaged fruit. The court hearing the case would have to sift the facts

of each employer-employee relationship to determine whether termination was justified in each case. Conceivably, one Puerto Rican might prove that he was discriminated against, but not the other Puerto Ricans employed by the same apple grower. Furthermore, the fact that one of the Virginia apple growers may have violated the rights of one or more of his Puerto Rican workers would not mean that the other Virginia apple growers had similarly violated the rights of their Puerto Rican workers.

This case, comprised of an aggregation of varying sets of facts and circumstances, differs dramatically from cases like *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), which involved freight rates which applied to all citizens of a state uniformly, or *Maryland v. Louisiana*, —— U.S. ——, 101 S. Ct. 2114, 68 L.Ed.2d 576 (1981), which involved a tax that applied equally to all gas imported into Louisiana not previously subjected to taxation by another state, or *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), which involved a West Virginia law which would have affected all interstate customers equally. This case represents an attempt by the Commonwealth of Puerto Rico to litigate the personal claims of a mere handful of its citizens in the guise of a *parens patriae* lawsuit.

C. *The Puerto Rican Workers Allegedly Aggrieved Have Adequate Remedies and Have Clearly Demonstrated Their Ability To Litigate the Issues Themselves.*

A third factor that militates strongly against granting *parens patriae* standing to the Commonwealth in this case is the availability of adequate remedies to the affected Puerto Rican workers. In fact, both the district court and the court of appeals agreed that "the practical ability of those injured to obtain complete relief" was a relevant factor in determining whether *parens patriae* standing was justified. 469 F. Supp. at 932 (Pet. App. A9); 632 F.2d at 369 (Pet. App. A23).

The inability of those individuals actually aggrieved to secure relief on their own has been a major factor justifying *parens patriae* standing from the beginning. "Traditionally, the term was used to refer to the King's power as guardian of persons under legal disability to act for themselves. For example, Blackstone refers to the sovereign or his representative as 'the general guardian of all infants, idiots, and lunatics,' and as the superintendent of 'all charitable uses in the kingdom.' " *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972) (footnotes omitted). The inability of private persons to secure relief on their own as a justification for *parens patriae* standing is a strain that runs through the Court's decisions from the first through the last. The Court's first case to acknowledge the propriety of *parens patriae* suits, *Louisiana v. Texas*, 176 U.S. 1, 19 (1900), noted that "[the complaint's] gravamen is not a special and peculiar injury such as would sustain an action by a private person. . . ." The Court's latest case to acknowledge *parens patriae* standing, *Maryland v. Louisiana*, —— U.S. ——, 101 S. Ct. 2114, 2126 n.18, 68 L.Ed.2d 576, 592 n.18 (1981), noted that in *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976), ". . . jurisdiction was not proper under the *parens patriae* doctrine since the claims represented the aggregation of individual claims for wrongfully paid taxes which the individual commuter taxpayers were able to contest. . . Moreover, unlike the situation in *Pennsylvania*, individual citizens have no forum in which to challenge the tax because they did not directly pay the tax and are not entitled to bring refund actions in Louisiana." [12]

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[12] *See also Missouri v. Illinois*, 180 U.S. 208, 241 (1908) (". . . suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies. . . ."); *Oklahoma v. Atchison, T. & S.F.R., Co.*, 220 U.S. 277, 289 (1911) (". . . although, an injury, in violation of law, to the property or rights of particular persons through the action of foreign corporations or citizens of States could be reached, without the intervention of the State, by suits instituted by the

Based on its review of the relevant *parens patriae* cases, the District of Columbia Circuit in *Commonwealth of Pennsylvania, by Shapp v. Kleppe*, 533 F.2d 668, 675 (D.C. Cir. 1975), observed that "[t]he cases indicate . . . that factors other than the degree of injury are influential in determining state standing. One of these which is in great measure dependent upon the injury alleged, is the presence or absence of a more appropriate party or parties capable of bringing the suit." The court then noted that "*parens patriae* standing appears to be most justifiable in those instances where undeniable harm has been done, but for some reason the individual injuries are not legally recognizable. . . The arguments in favor of allowing such standing become less compelling as it becomes more feasible to achieve complete relief through suits by the parties actually aggrieved." *Id.* at 675 n.42.

Adequate remedies are available to the affected Puerto Rican workers. A number of these workers have brought suit against some of the 32 Virginia growers in the local courts of Puerto Rico.[13] All but two of the 32 Virginia

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persons directly or immediately affected."); *Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, 160 F. Supp. 337, 390 (E.D. La. 1958) ("Actually there is no need that Minnesota intervene as a party. The Minnesota dairy industry can adequately protect its own interest.").

[13] *See, e.g., William Ocasio, et al. v. Irwing King Drilake Farm, Inc.*, Civil No. CS 78-2443 (Guayama Div.) (10 plaintiffs); *Obdulia Caban Badillo, et al. v. Fred and Philip Glaize*, Civil No. TS 78-3952 (Aguadilla Div.) (13 plaintiffs); *Rafael Diaz Medina v. Frederick Farms, Inc.*, Civil No. 78-3273 (Humacao Div.); *Gervasio Vazques Solis v. Harvey Brumback*, Civil No. 78-3300 (Humacao Div.); *Juan R. Mariana Ortiz, et al. v. Henry Brumback Woodbine Farm, Inc.*, Civil No. CS 78-2441 (Guayama Div.) (2 plaintiffs); *Carlos Flores Reys v. C.L. Robinson*, Civil No. CS 79-100 (Humacao Div.); *Eladio Saez Vellon, et al. v. E. Blackburn Moore*, Civil No. 78-3335 (Humacao Div.) (6 plaintiffs); *Bienvenida Soto Vega v. Orchard Management Co.*, Civil No. 78-3299 (Humacao Div.); *Santiago Lebron, et al. v. Orchard Management Co.*, Civil No. 78-2705 (Guay-

apple growers in this case were named as defendants in a purported class action filed in the United States District Court for the District of Puerto Rico. *Ceferino Lopez Rivas, et al. v. Secretary of Labor F. Ray Marshall, et al.*, Civ No. 78-2175 (D.P.R., filed November 9,

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ama Div.) (3 plaintiffs); *David Cruz Sosa v. Wayne Mc. Onturff*, Civil No. 79-1838 (Aguadilla Div.); *Serafin de Jesus Rivera, et al. v. McDonalds Farms*, Civil No. 78-1869 (Utuado Div.) (3 plaintiffs); *William Del Valle Fonseca, et al. v. Messick and Beaver*, Civil No. CS 79-589 (Caguas Div.) (3 plaintiffs); *Miguel Laboy Colon v. Ray D. Rinker Estate*, Civil No. 79-1895 (Caguas Div.); *Agustin Morales v. Garland R. Cather*, Civil No. TS 78-3951 (Aguadilla Div.); *Ramon L. Charles Rosaly v. Irwing King Drilake Farm, Inc.*, Civil No. 79-1717 (Guayama Div.); *Julia Surrilo, et al. v. Irwing King Drilake Farm, Inc.*, Civil No. 78-2435 (Guayama Div.) (2 plaintiffs); *Jesus M. Pinto Rodriguez, et al. v. Alfred L. Snapp & Son, Inc.*, Civil No. 79-743 (907) (San Juan Div.) (2 plaintiffs); *Moises Alvarez Gonzalez, et al. v. Frederick Farms*, Civil No. TS 79-1839 (Aguadilla Div.) (2 plaintiffs); *Catalino Lopez Feliciano v. Orchard Management Co.*, Civil No. TS 79-1837 (Aguadilla Div.); *Virginia Arroyo v. Frederick Farms*, Civil No. 80-245 (Arecibo Div.); *Miguelina Vega v. Garland R. Cather*, Civil No. 80-254 (Arecibo Div.); *Daniel Caban Canan, et al. v. John T. Watts & Sons*, Civil No. 80-200 (Mayaguez Div.) (2 plaintiffs); *Jose R. Garcia Colon, et al. v. Messick & Beaver*, Civ. No. CS 80-577 (Aibonito District) (3 plaintiffs); *Jose M. Perez Medina v. Garland R. Cather*, Civ. No. CD 80-1889 (Aguadilla Div.); *Cruz Cortez Dominicci v. James Clevenger*, Civ. No. 80-1396 (Ponce Div.); *Efrain Serrano Viera, et al. v. Orchard Management and E. Blackburn Moore*, Civ. No. CS 80-1544 (Humacao Div.) (2 plaintiffs); *Manuel Mercado Nieves v. Fred and Phillip Glaize*, Civ. No. TS 80-3300 (Aguadilla Div.); *Gervasio Vasquez Solis v. Orchard Management and Harvey Brumback*, Civ. No. CS 80-1543 (Humacao Div.); *Alberto Acedevo Valentin v. Fred and Philip Glaize*, Civ. No. TS 80-724 (Aguadilla Div.); *Hector L. Parrila v. Henry E. Wyatt*, Civ. No. CS 80-1545 (Humacao Div.); *Angel L. Valle v. Frederick Farms*, Civ. No. CS 81-114 (Aguadilla Div.); *Victor M. Santos Vasquez v. D.K. Russell and Sons*, Civ. No. PE 81-707 (907) (San Juan Div.); *Carmelo Rosario Vasquez v. Irwing King Drilake Farm, Inc.*, Civ. No. 81-1849 (Guayama Div.); *Marcos Marti Sanabria v. John T. Watts & Sons*, Civ. No. CS 81-572 (Mayaquez Div.); *Ricardo Aponte Galindo v. Orchard Management Co.*, Civ. No. CS 80-289 (Mayaquez Div.).

1978). Shortly after the companion case to the instant action was dismissed by the United States District Court for the Southern District of New York, *Commonwealth of Puerto Rico ex rel. Quiros v. Bramkamp*, Civ. No. 79-0199 (September 28, 1979), *rev'd*, 654 F.2d 212 (2d Cir. 1981), a class action was filed on behalf of mainland and Puerto Rican migrant workers against the New York apple growers and others, seeking both damages and injunctive relief against future violations. *Juan Valderrama Rios, et al. v. Secretary of Labor F. Ray Marshall, et al.*, Civ. No. 79-5711 (S.D.N.Y., filed October 22, 1979).

In addition to the forums where the allegedly aggrieved Puerto Ricans can litigate their grievances, the Employment Service Complaint System established by the U.S. Department of Labor is available to investigate violations of Employment Service regulations. *See* 20 C.F.R. Part 658 (1978). The U.S. Department of Labor has the authority to initiate an investigation on its own when it has probable cause to believe that an employer has not lived up to the terms of his temporary labor certification, 20 C.F.R. § 655.210(a) (1978), and the Department's regulations provide for the investigation of all employee complaints relating to failure to comply with the terms of the job offer or applicable regulations. 20 C.F.R. § 658.501 (1978). In fact, the very Employment Service regulations which the Commonwealth is seeking to enforce by means of this lawsuit specify the procedures to be followed when there is cause to believe that an employer has not lived up to the terms of his temporary labor certification. 20 C.F.R. § 655.210 (1978). The Employment Service regulations clearly provide that a labor supply state, such as the Commonwealth in this case, will play no role in the investigation of employee complaints when the work has been performed in another state, other than forwarding the complaints to the state where the work was performed. 20 C.F.R. § 658.412(d) (1978).

Although the district court and the court of appeals both agreed that "the practical ability of those injured to obtain complete relief" was an important factor in determining whether *parens patriae* standing was justified, 469 F. Supp. at 932 (Pet. App. A9), 632 F.2d at 369 (Pet. App. A23), there is a striking contrast in their reactions to the lawsuits filed by some of the Puerto Rican workers allegedly aggrieved by the actions of the 32 Virginia growers. The district court pointed to the "numerous individual lawsuits, as well as a broad based class action, [which] have been filed in the Puerto Rican and federal courts by some of the displaced workers against some of the growers, including several who are defendants herein," and concluded that, "[s]ince those most directly affected stand ready and willing to vindicate their own rights, the imperative for state intervention is absent." 469 F. Supp. at 934 (Pet. App. A14). The district court declared that it could "detect no valid purpose to be served by allowing this action to proceed when the fundamental issues are already being litigated elsewhere." *Id.*

In sharp contrast, the court of appeals ignored the many lawsuits already filed by the Puerto Rican workers —there being not one reference to these lawsuits in the court's opinion—apparently secure in its presumption, apparently arrived at through deductive reasoning, that such suits were not possible. The court of appeals observed that "migrant workers are so destitute that they must leave their homes for two or three months each year to seek employment," 632 F.2d at 370 (Pet. App. A25-A26), and, apparently on the basis of that premise, reasoned that "it cannot be said with any assurance that they are in positions to litigate these issues effectively." [14] *Id.* (Pet. App. A26). The court of appeals

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[14] *Cf. Hawaii v. Standard Oil Co.*, 405 U.S. 251, 265 (1972), where this Court noted "in passing the State's claim that the costs and other burdens of protracted litigation render private citizens impotent to bring treble-damage actions, and thus that denying

then added its final observation that "they would, at best, achieve a piecemeal solution of Puerto Rico's parens patriae grievances and in the process wastefully consume judicial resources." *Id.* (Pet. App. A26).

Only by refusing to acknowledge the numerous lawsuits already brought by the Puerto Rican workers could the court of appeals have concluded that those workers are not in positions to litigate the issues effectively. Furthermore, the court of appeals completely overlooked the availability of the Employment Service Complaint System, which places a duty on the U.S. Department of Labor to investigate all employee complaints. *See* 20 C.F.R. Part 658 (1978). Finally, the concern of the court of appeals that private lawsuits would achieve a piecemeal solution and wastefully consume judicial resources disregards the fact that a *parens patriae* lawsuit would duplicate existing litigation involving the same facts and circumstances. A *parens patriae* lawsuit would not preclude private lawsuits by the Puerto Rican workers but would merely add to them. Thus, the Commonwealth would seek injunctive relief against a defendant grower in one action while Puerto Rican workers sought monetary damages and, in some cases, injunctive relief against the same grower in another action, possibly with conflicting results. If the Commonwealth were to obtain injunctive relief, the federal courts would be faced with a continuing involvement in private employment disputes. Any future discharge of a Puerto Rican worker by one of the defendant Virginia growers for alleged lack of productivity could find the Commonwealth rushing back to court seeking a contempt citation to enforce the injunction. The court would then have to examine all the facts and circumstances of that employee-

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Hawaii the right to sue for injury to her quasi-sovereign interests will allow antitrust violations to go virtually unremedied. *Private citizens are not as powerless, however, as the State suggests.*" (Emphasis added.)

employer relationship to determine if the injunction had been violated.

CONCLUSION

The judgment of the court of appeals reversing the dismissal of the complaint against petitioners for lack of *parens patriae* standing should be reversed.

Respectfully submitted,

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No. 80-1305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALFRED L. SNAPP & SON, INC., *et al.*,
Petitioners,

v.

COMMONWEALTH OF PUERTO RICO
on the relation of PEDRO BAREZ,
SECRETARY, DEPARTMENT OF LABOR AND
HUMAN RESOURCES,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

May the Commonwealth of Puerto Rico sue as *parens patriae* for declaratory and injunctive relief against thirty-two Virginia apple growers where federal statutes and regulations entitle United States citizens to priority in employment opportunities over foreign workers and where it is alleged,

a. that the defendant growers have traditionally used crews of Jamaican workers to bring in the annual harvest and resisted attempts by the Commonwealth in 1976 and 1977 to place Puerto Rican workers in the orchards;

b. that the Commonwealth during September 1978 suffered from an overall adult unemployment rate of 18.5 percent and a rural unemployment rate of 23 percent;

c. that, in an effort to find employment opportunities for Puerto Rican workers, the Commonwealth recruited 787 unemployed workers for jobs in defendants' orchards in 1978 but that virtually the entire effort to place such workers was defeated by widespread refusals to hire and termination of employment of Puerto Rican workers;

d. that, of 787 workers recruited by the Commonwealth for work in defendants' orchards, only 420 arrived in Virginia and the flights of the remainder were cancelled on advice of the United States Department of Labor in consequence of the refusal by apple growers to hire Puerto Rican workers who had already arrived at the orchards; and

e. that of the 420 workers who arrived at defendants' orchards at the start of the harvest less than 30 still had employment three weeks later.

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IN THE

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OCTOBER TERM, 1981

No. 80-1305

ALFRED L. SNAPP & SON, INC., *et al.*,
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v.

COMMONWEALTH OF PUERTO RICO
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SECRETARY, DEPARTMENT OF LABOR AND
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On Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

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BRIEF FOR RESPONDENT

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED

Respondent is satisfied with these sections as they appear in Brief for Petitioners at 1-2.[1]

[1] The opinions of the district court and court of appeals are appended to the Petition for Writ of Certiorari (Pet. App.). The brief of the United States Secretary of Labor as amicus curiae is appended to the Supplemental Brief in Opposition to Petition for Writ of Certiorari (Resp. App.). References to the Joint Appendix shall be designated "J.A."

STATEMENT OF THE CASE

This litigation arises out of a larger controversy involving attempts by the Commonwealth of Puerto Rico ("the Commonwealth") to place unemployed agricultural workers in jobs in the annual East Coast apple harvest. Citizens of Puerto Rico are United States citizens who are entitled to priority in employment over foreign workers. The instant action involves an effort by the Commonwealth to secure the federally guaranteed preference for Puerto Rican workers in connection with the harvesting of apples.

Each year thousands of temporary farm workers are needed to bring in the fall apple harvest in East Coast states. Complaint ¶ 60; J.A. 16. In order to meet their labor needs, apple growers have traditionally employed not only local but also out-of-state and foreign workers. Many growers, including petitioners, have customarily used crews of Jamaican workers. (*Id.*)

The Wagner-Peyser Act, 29 U.S.C. § 49 *et seq.*, authorizes the establishment of a federal employment service system and the designation of state employment services to function in conjunction with the federal service. The Department of Labor and Human Resources of the Commonwealth of Puerto Rico[2] is a "state agency" designated under the Act. Regulations promulgated pursuant to the Wagner-Peyser Act, *supra*, provide first for state agency placement of local workers with local agricultural employers. If local workers are not available, the Interstate Clearance System ("ICS") may be used to recruit, through other state agencies, workers available in other states. 20 C.F.R. § 602.2. The purpose of this joint federal-state program is to assist employers in locating workers and workers in securing employment. The Employment Service System processes employment offers throughout the United States, Guam, Puerto Rico, and the Virgin Islands to reach the potential labor pool.

[2] Throughout this brief, unless specifically identified, the United States Department of Labor will be referred to as "USDOL" and the Department of Labor of the Commonwealth of Puerto Rico will be referred to as "PRDOL."

In carrying out the provisions of the Wagner-Peyser Act, PRDOL is required to maintain effective placement services for agricultural and related industry employers and workers, including programs for the intrastate recruitment and transfer of workers as well as programs for the interstate recruitment and movement of workers. 20 C.F.R. § 602.8. PRDOL is also required to provide specified public employment services through local employment office facilities of such number, size, and location as may be necessary in view of population distribution and employment patterns within the state. 20 C.F.R. § 602.11.

While the United States Employment Service endeavors to locate and place United States citizens in all available positions, employers may hire foreign workers under certain stringent conditions subject to the authority of the Immigration and Naturalization Service ("INS"). The Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, authorizes the admission of temporary foreign workers into the United States only "if unemployed persons capable of performing such service or labor cannot be found in this country...." 8 U.S.C. § 1101(a)(15). The Secretary USDOL is charged with responsibility for determining when domestic workers are unavailable such that the entry of foreign workers may be permitted.

An employer who desires to use foreign workers for temporary employment is required to file a temporary labor certification application, including a job offer for U.S. workers, with a local office of a State employment service agency eighty days prior to the expected date of need. The eighty-day period allows sufficient time to determine whether U.S. workers are available. A recruitment period of sixty days is required by the Temporary Labor Certification Process regulations with a determination of availability made by the USDOL Regional Administrator twenty days before the date of need. Temporary labor certification is denied where domestic workers are available. 20 C.F.R. § 655.200, Pet.App. A-34.

As part of the temporary labor certification application, an employer must provide assurances that he will cooperate with

USDOL in the recruitment of domestic workers up until the time the certified foreign workers have departed for the place of employment. 20 C.F.R. § 655.203(d), Pet.App. A-47. The employer also agrees to replace foreign workers, up until fifty percent of their contract periods have expired, with qualified domestic workers who apply for those positions. 20 C.F.R. § 655.203(e), Pet.App. A-48. The employer must offer domestic workers at least the same benefits as he offers foreign workers and may not impose greater restrictions on domestic than foreign workers. 20 C.F.R. § 655.202(a), Pet. App. A-40.

If USDOL has probable cause to believe that an employer has not lived up to the terms of the temporary labor certification, it may initiate an investigation. 20 C.F.R. § 655.210(a), Pet.App. A-56. If it is determined that the employer is not in compliance with those terms, it may deny labor certification in the coming year. 20 C.F.R. § 655.210.

In addition, an aggrieved individual worker may file a complaint with any state employment agency, but the complaint will be investigated by the state agency in which the alleged violation occurred. A party may appeal the state's decision to the USDOL Regional Administrator, 20 C.F.R. § 658.418(c), after he has exhausted his state remedies, 20 C.F.R. § 658.421(a), and USDOL may then conduct further investigation of the complaint and call for a hearing if it deems one appropriate. 20 C.F.R. §§ 658.421(c) and (e), 658.424. The ultimate sanction against an employer found to have failed to comply with the terms of a job order or to have committed other violations is denial of access to the Employment Service System. The state may impose this sanction in accordance with federal regulations. 20 C.F.R. § 658.501(a).

PRDOL is an active member of this employment network. Concerned with its rising level of unemployment, the Commonwealth has attempted since 1976 to refer agricultural workers to East Coast apple growers through the Employment Service System. Complaint ¶ 61; J.A. 16-17. These attempts have been unsuccessful because of resistance by the growers to the employment of Puerto Rican workers. Thus in 1976, despite an agreement by growers' associations to hire 1,000

Puerto Rican workers, East Coast growers hired only 613 workers, most of whom were dismissed almost immediately for alleged unproductivity. During 1977, because of grower litigation over Puerto Rico Public Law No. 87,[3] only ninety-three Puerto Ricans were referred to East Coast growers. Many of these workers were also dismissed for alleged unproductivity. Complaint ¶ 61; J.A. 18.

Public Law No. 87, enacted by the legislature of Puerto Rico in 1962, was designed to protect agricultural workers from "discriminatory or abusive treatment by unscrupulous employers" (J.A. 32), and required employers to negotiate written contracts, containing minimum guarantees fixed through regulation by the Secretary PRDOL, with workers to be employed off island. P.R. Laws Ann. tit. 29, § 529 (1966). Failure to comply with the terms of the law subjects an employer to criminal penalties. *Id.* at § 534. Apple growers took issue with this contract requirement and its conditions as "onerous" and "burdensome." USDOL agreed and took the position that the Puerto Rican workers who insisted on the additional protections afforded them by Public Law 87 were not "available" domestic workers within the meaning of the Immigration and Nationality Act.[4] As a result, Puerto Rican workers were excluded from the domestic work force referred to the growers for the harvests of 1976 and 1977.

The First Circuit subsequently agreed with USDOL's determination that Public Law 87 rendered Puerto Rican workers "unavailable" within the meaning of the Immigration

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[3] Public Law No. 87, P.R. Laws Ann. tit. 29, §§526-534 (1966).

[4] *See* Galan v. Dunlop, 411 F.Supp. 268 (D.D.C. 1975), *appeal dismissed and remanded sub nom.* Galan v. Usery, 551 F.2d 467 (D.C. Cir. 1977) (unpublished). The District Court, Gasch, J., upheld the Department of Labor's determination that Puerto Rican workers who insisted upon the benefits of a contract under Public Law 87 were not legally available. The Farm Labor Executive Committee (representing apple growers in ten East Coast states, including Virginia) and the Shoreham Apple Producers' Cooperative, Inc. (Shoreham, Vermont) intervened as defendants and actively participated in the case.

and Nationality Act.[5] Thereafter, because the provisions of Public Law 87 were serving to bar employment of Puerto Ricans, the Commonwealth legislature amended the law in July 1978 to authorize the Secretary PRDOL to exempt from the provisions of Public Law 87 employers whose job offers are referred through the Interstate Clearance System of the Employment Service System. J.A. 35-36.

In July 1978, then-Secretary Quiros announced his intention to exempt from Public Law 87 those apple growers whose 1978 job orders would be transmitted to Puerto Rico through the Interstate Clearance System. By August 14, 1978, the date certification decisions were to be made by the Regional Administrator, Secretary Quiros had recruited 1,094 Puerto Rican workers. Complaint ¶ 63; J.A. 17. The certification applications of the growers were therefore denied, in whole or in part, based on the availability of Puerto Rican workers to fill 1,094 job orders. Subsequent to August 14, and prior to the beginning of the harvest, enough workers had been recruited in Puerto Rico to satisfy the total number of 2,318 job orders transmitted to Puerto Rico. Complaint ¶ 64; J.A. 17.

Faced with the prospect of large numbers of Puerto Rican workers in jobs traditionally filled by foreign workers, the apple growers, acting through their associations, filed a civil action on August 31, 1978, challenging the propriety of the exemption of the growers from Public Law 87 and the referral of Puerto Rican workers under the Interstate Clearance System.[6] The growers sought an injunction ordering the Secretary USDOL to certify the unavailability of the 1,094 Puerto Rican workers. The growers also requested that the INS Commissioner be ordered to issue temporary visas for those jobs in addition to the 4,531 visas already issued to the growers. In other words, the growers sought to fill all available positions with Jamaican labor, even though Puerto Rican workers had been recruited.

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[5] *See* Hernandez Flecha v. Quiros, 567 F.2d 1154 (1st Cir. 1977), *cert. denied,* 436 U.S. 945 (1978).

[6] Frederick County Fruit Growers Association, Inc. v. Marshall, Civ. No. 78-0086(H) (W.D. Va.), *appeals dismissed and remanded,* 594 F.2d 857 (4th Cir. 1979) (unpublished).

The district court (Turk, Ch.J.) determined that Puerto Rican workers were legally available, but the court nonetheless issued a mandatory preliminary injunction ordering that all the visas sought by the growers be issued.[7]

Although the plaintiff growers had assured the court in the *Frederick County* litigation that they would not be relieved of their responsibility to employ domestic workers even if the injunction admitting the Jamaican workers were granted, the growers refused to hire or hired and then dismissed most of the Puerto Rican workers referred to them. Only 992 of the 2,318 Puerto Rican workers who had been recruited left for the mainland. Flights for the remainder were cancelled following USDOL notification to Secretary Quiros that further referrals should be halted because many of the growers were refusing to employ the Puerto Rican workers who had already arrived at the orchards. Complaint ¶ 64; J.A. 17-18. Of 420 Puerto Rican workers who arrived at the Virginia orchards for the harvest, fewer than thirty were employed three weeks later (*id.*).

The Commonwealth, confronted again with industry-wide resistance to the employment of its citizens, filed the instant action on January 11, 1979 in the Western District of Virginia.[8] The suit sought declaratory and injunctive relief against violations of federal migrant labor laws and regulations by thirty-two Virginia apple growers and various owners, officers, and agents thereof named as defendants. Money damages were not sought. The complaint alleged numerous specific instances of unlawful conduct on the part of various defendants against

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[7] The district court's decision was based in part on its conclusion that issuing the order would cause no harm to domestic workers willing and available to work, whereas failure to issue the order might result in the loss of millions of bushels of apples.

[8] Commonwealth of Puerto Rico ex rel. Carlos S. Quiros v. Alfred L. Snapp & Son, Inc., Civ.A. No. 79-0007(H).

By letter dated December 22, 1981, counsel for the Commonwealth advised the Court pursuant to Supreme Court Rule 40.3 that the Honorable Pedro Barez has succeeded the Honorable Carlos S. Quiros as Secretary, Department of Labor and Human Resources of the Commonwealth. Accordingly, it was requested that an order of substitution be entered naming Secretary Barez as the party on whose relation the suit is brought.

named workers. *See* Complaint ¶¶ 65-68; J.A. 18-25. The complaint further alleged that, by refusing to hire Puerto Rican workers, by terminating Puerto Rican workers on various pretexts, and by subjecting Puerto Rican workers to working conditions less favorable than those provided to Jamaican workers, the defendant apple growers have caused irreparable injury to the Commonwealth by frustrating its efforts to participate in the federal employment system as a labor supply state, hindering the Commonwealth's Secretary of Labor in the performance of his statutory charge to further the interests and promote the opportunities of Puerto Rican laborers, and depriving the Commonwealth's citizens of rights and benefits guaranteed them by federal law. Complaint ¶ 77; J.A. 29.

On January 12, 1979, a nearly identical companion suit was instituted against thirty New York apple growers in the Southern District of New York. *Commonwealth of Puerto Rico ex rel. Quiros v. Bramkamp,* Civ. No. 79-0199 (S.D.N.Y.). The growers in both actions filed identical motions to dismiss for lack of standing. On April 19, 1979, Judge Turk dismissed the Commonwealth's complaint for want of *parens patriae* standing. The court held that because the 1978 harvest jobs were temporary and because direct harm from defendants' conduct befell only 787 migrant workers, less than a substantial majority of the Commonwealth's citizens, the resulting injury to the Commonwealth was neither severe nor generalized enough to permit the Commonwealth to take up the cause.[9]

On October 9, 1980, the United States Court of Appeals for the Fourth Circuit reversed the district court and held that the Commonwealth possesses standing to maintain this action as *parens patriae. Commonwealth of Puerto Rico ex rel. Quiros v. Alfred L. Snapp & Son, Inc.,* 632 F.2d 365 (4th Cir. 1980). The Second Circuit also reversed the district court's dismissal of the complaint in *Commonwealth of Puerto Rico ex rel. Quiros v. Bramkamp,* 654 F.2d 212 (2d Cir. 1981), reasoning that the

[9] Shortly thereafter Judge Kevin T. Duffy of the United States District Court for the Southern District of New York, in a one-sentence memorandum endorsement, dismissed the Commonwealth's complaint in the companion *Bramkamp* case "for reasons stated in the decision of Judge James Turk."

Commonwealth had asserted "a broader range of state interests beyond those of the workers involved," *id.* at 216, and thereby possessed standing to sue as *parens patriae.*

SUMMARY OF ARGUMENT

It is settled that a state has the right to sue as *parens patriae* to prevent or repair harm to its quasi-sovereign interests. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 (1972). It is also settled that a state has standing as *parens patriae* in a controversy which in substance implicates the state's interest in economic supervision. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450-451 (1945); *Pennsylvania ex rel. Shapp v. Kleppe*, 533 F.2d 668, 674 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 977 (1976). The Commonwealth, as sovereign representing the collective interests of its people, alleges injury to its economy and to the welfare of its citizens as a result of refusal by the defendant growers, in violation of federal law, to employ its citizens in preference to temporary foreign labor. The gravamen of the Commonwealth's claim "runs far beyond the claim of damage to individuals," *Georgia v. Pennsylvania R.Co.*, 324 U.S. at 452, and was correctly recognized by the court of appeals to implicate the requisite quasi-sovereign interest.

Petitioners seek to minimize the gravity of the Commonwealth's concern by arguing that only a small portion of Puerto Rico's population was directly harmed in 1978. But the court of appeals correctly recognized that while the number of citizens affected is a factor to be taken into account in determining *parens patriae* standing, it is "the magnitude and pervasiveness of the societal harm that must be weighed—not the directness of the injury to particular individuals." 632 F.2d at 370. This Court has scrutinized the number of citizens involved in suits between states in order to prevent attempts to circumvent the Eleventh Amendment, *New York v. New Jersey*, 256 U.S. 296, 309 (1921), but has never imposed a strict "numbers" analysis in *parens patriae* suits brought against private citizens of another state. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945).

Among the prudential considerations which may militate against standing for a state asserting a justiciable quasi-sovereign interest is "the presence or absence of a more appropriate party or parties capable of bringing the suit." *Pennsylvania ex rel. Shapp v. Kleppe,* 533 F.2d at 675. Petitioners argue that standing should be precluded because some of the workers most directly affected have filed lawsuits or may avail themselves of USDOL's Employment Service Complaint System. Both the court below and the Second Circuit in the *Bramkamp* case rejected this argument, the court below noting that migrant workers so destitute they must leave their homes to seek temporary employment are in no position to litigate effectively the issues raised in the Commonwealth's complaint. 632 F.2d at 370. Even more fundamental, the Second Circuit recognized that individual workers' interests are not co-extensive with those of the Commonwealth. 654 F.2d at 217. *Post hoc* remedies such as damages, or sanctions against employers imposed by USDOL's complaint system, are unrelated either to the nature of the interests asserted by the Commonwealth or the injunctive relief sought. The Commonwealth is the most appropriate party to bring suit and the only party capable of pursuing a comprehensive resolution of the issues posed by this controversy.

Petitioners also argue that the individual instances of employer misconduct alleged in the complaint reveal that this suit is an attempt to litigate as a volunteer the personal claims of a mere handful of Puerto Rico's citizens. What petitioners in fact argue are questions of proof for trial. Such proof will necessarily involve particular instances of unlawful conduct as parts of the whole. Petitioners do not address the fact that this lawsuit cannot be for the benefit of particular individuals if the relief sought accrues not to particular individuals but to a presently undefinable portion of Puerto Rico's citizenry.

ARGUMENT

The Interest of the Commonwealth of Puerto Rico in Securing Compliance With Federal Migrant Labor Law in the Wake of a Pattern of Discriminatory Treatment of Hundreds of Puerto Rican Workers by Defendant Growers and Attempts to Frustrate Referral of Puerto Rican Workers to Jobs in the East Coast Apple Harvest Supports an Action As Parens Patriae

It is settled that a state has the right to sue as *parens patriae* to prevent or repair harm to its "quasi-sovereign" interests. *Maryland v. Louisiana,* 451 U.S. 725 (1981); *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 258 (1972). The concept of *parens patriae* is linked to that of sovereignty. *Board of Supervisors of Fairfax County, Virginia v. United States,* 408 F.Supp. 556, 566 (E.D. Va. 1976), *appeal dismissed sub nom. Board of Supervisors of Fairfax County, Virginia* v. *District of Columbia,* 551 F.2d 305 (4th Cir. 1977) (unpublished). As sovereign representing the collective interests of its people, the Commonwealth of Puerto Rico is recognized to possess the capacity of a state to bring an action *parens patriae. Commonwealth of Puerto Rico v. SS Zoe Colocotroni,* 456 F.Supp. 1327, 1337 (D.P.R. 1978), *aff'd,* 628 F.2d 652 (1st Cir. 1980), *cert. denied,* 450 U.S. 912 (1981). [10] It is settled also that injury to a state's economy, if sufficiently severe and generalized, gives rise to a quasi-sovereign interest which will justify a representative action by a state as *parens patriae. Hawaii v. Standard Oil Co., supra; Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 450-51 (1945); *Pennsylvania v. West Virginia,* 262 U.S. 553, 591 (1923); *Pennsylvania ex rel. Shapp v. Kleppe,* 533 F.2d at 675.

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[10] Puerto Rico is deemed a "State" for purposes of the recruitment and referral of workers through the Employment Service System established by the Wagner-Peyser Act, 29 U.S.C. § 49b(b) (Supp. 1978), and for purposes of the Immigration and Nationality Act, 8 U.S.C. § 1101 (a)(36), (38) (1970).

Whether a state has a sufficient interest in a controversy to sue as *parens patriae* has eluded precise definition.[11] In each instance the question is whether the state has an underlying interest "apart from that of particular individuals who may be affected," *Georgia v. Pennsylvania R. Co.*, 324 U.S. at 451, "the gravamen of which runs beyond the claim of damage to individuals," 324 U.S. at 452, and which is "independent of and behind the titles of its citizens." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). Each case poses a question of law which can be determined only by an analysis of the specific facts involved.

Both the court of appeals and the district court recognized that the Commonwealth's concern for the health of its economy and the welfare of its citizens constituted a quasi-sovereign interest which could properly be asserted in a *parens patriae* action. And, in assessing the adequacy of the Commonwealth's interest in the particular circumstances of this case, both courts employed the same three factors: the size of the segment of the population adversely affected, the magnitude of the harm inflicted, and the practical ability of those injured to obtain complete relief. 632 F.2d at 369, Pet.App. at A-22; 469 F.Supp. at 932, Pet.App. at A-9. However, the court of appeals concluded that, in concentrating solely on the 787 individuals directly injured, the district court did not accurately weigh the magnitude of the harm to the general population resulting from the damaged recruitment effort. While affirming that *parens patriae* representation requires that a substantial portion of the citizens of a sovereign be affected, the court of appeals observed that "There has never been cast a hard and fast game of numbers." 632 F.2d at 370, Pet.App. at A-25. The citizenry may be affected either directly or indirectly and, the court held, the proper consideration is "the magnitude and the pervasiveness of the societal harm that must be weighed — not the directness of the injury to particular individuals." *Id.*

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[11] In the closely related area of suits by one state against another in which the original jurisdiction of the Supreme Court is invoked, it has been observed that "[I]t would be objectionable, and, indeed, impossible for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court." Missouri v. Illinois, 180 U.S. 208, 241 (1901).

A. The Commonwealth's Quasi-Sovereign Interest Transcends the Grievances of Individual Workers in the 1978 Harvest And, in Weighing the Magnitude of Harm to the General Population, the Court of Appeals Applied Recognized Principles in Refusing to Limit Its Consideration to Individuals Directly Harmed in the 1978 Harvest

In dealing with the interest asserted by the Commonwealth in this litigation, petitioners have sought to direct attention to the individual employment aspects of the controversy and away from its broader aspects. Thus, both questions presented by the petition for certiorari were cast solely in terms of breach of contract.[12] In their brief on the merits, petitioners have rephrased the questions presented for review so that at least passing reference is made to the fact that the Commonwealth's complaint also alleged "violations of federal statutes and regulations."[13] Despite rephrasing of the questions presented, however, petitioners persist in their attempt to avoid the broader aspects of this complaint. Thus, they say, "The complaint seeks a declaratory judgment that the Virginia growers breached the terms of their contracts with the Puerto Rican farm workers." Brief for Petitioners, 15. Throughout their brief, petitioners seek to atomize this controversy by characterizing it as nothing more than a handful of private employment disputes. Brief for Petitioners, at 16, 24, 26, 27.

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[12] The petition presented two questions for review:

(1) Whether the Commonwealth of Puerto Rico has *parens patriae* standing to sue Virginia apple growers who allegedly breached the employment contracts of certain Puerto Rican workers;

(2) Whether the Commonwealth of Puerto Rico has *parens patriae* standing based upon alleged harm to its general economy where a small number of Puerto Rican citizens were [sic] harmed by the Virginia apple growers' alleged breaches of employment contracts, the impact of the alleged breaches of employment contracts upon the general economy of Puerto Rico was relatively slight, and the affected individual Puerto Ricans were in a position to vindicate their own rights and were actually litigating the same issues in other forums.

Petition for Writ of Certiorari, i, No. 80-1305.

[13] Brief for Petitioners, (i), No. 80-1305.

A review of the background and allegations of the complaint demonstrates that petitioners mischaracterize the nature of this action. The complaint alleges that thousands of temporary farm workers are required each year in the fall by East Coast apple growers, and that many growers have traditionally sought to employ Jamaican workers. Complaint ¶ 60; J.A. 16.[14] The complaint alleged further that, in an effort to secure jobs for unemployed workers, PRDOL in 1976 and again in 1977 attempted to place Puerto Rican workers in jobs in the East Coast apple harvest but that the growers refused to accept many of these workers while others who were hired were dismissed for alleged unproductivity. Complaint ¶ 61; J.A. 16-17.

Prior to 1978, the growers through their representatives had complained that the protections established by Puerto Rico's Public Law 87 rendered it difficult to come to terms with Puerto Rican authorities to use workers from Puerto Rico. *See Galan v. Dunlop,* 411 F.Supp. 268, 270 (D.D.C. 1975), *appeals dismissed and remanded sub nom. Galan v. Usery,* 551 F.2d 467 (D.C. Cir. 1977) (unpublished). In 1978, following the decision of the First Circuit in *Hermandez Flecha v. Quiros,* 567 F.2d 1154 (1st Cir. 1977), *cert. denied,* 436 U.S. 945 (1978), which held that the provisions of Puerto Rico's Public Law 87 imposed conditions on the employment of Puerto Rican laborers more stringent than those of federal law, and thereby rendered such workers legally "unavailable" as domestic workers within the meaning of the Immigration and Nationality Act, *supra,* the Commonwealth legislature was required to focus on Public Law 87. Taking into account that the number of Puerto Rican agricultural workers hired for work on U.S. farms had dropped "alarmingly" from 21,654 in 1967 to only 4,284 in 1977, and that there existed a great mass of potential workers available and willing to obtain lucrative employment, the legislature concluded that it was important for reasons of public policy "to seek a solution that will allow adequate channeling of the aspirations and needs of these persons to obtain a job,

[14] Apple picking is described by USDOL as unskilled labor. *See* Elton Orchards, Inc. v. Brennan, 508 F.2d 493, 499 n. 7 (1st Cir. 1974).

without needlessly harming the workers' interest in obtaining the maximum protection available."[15]

In consequence, the legislature amended the law to authorize the Secretary PRDOL to exempt from the provisions of Public Law 87 job orders referred to him through the Interstate Clearance System of the United States Employment Service. J.A. 35. The Commonwealth legislature thus consented to having Puerto Rican workers protected solely by federal standards but vested the Secretary with "supervisory authority to guarantee full compliance of [sic] the conditions stipulated in the job offer filed by any employer." J.A. 35.

While East Coast growers had complained of the additional burdens imposed by Public Law 87, they continued to complain in August 1978 when they were exempted from those provisions. In a civil action filed on August 31, 1978, *Frederick County Fruit Growers Ass'n, Inc. v. F. Ray Marshall,* Civ.A. No. 77-0086 (W.D.Va.), four associations representing apple growers in three states joined in a civil action to contend that they had not been properly exempted by the Secretary PRDOL from the provisions of Public Law 87.[16] Each association sued on its own behalf and on behalf of its grower members, and sought a declaration that 1,094 Puerto Rican workers should not be deemed "available" U.S. workers within the meaning of the Immigration and Nationality Act. The plaintiff growers also sought a mandatory injunction requiring the Immigration and Naturalization Service to issue 1,460 temporary non-immigrant visas for the admission of foreign workers in addition to the 4,531 visas which INS had already issued the growers for Jamaican workers.

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[15] Preamble to Act of July 13, 1978, Amending Public Law 87; J.A. 34.

[16] Plaintiff Frederick County Fruit Growers Association, Inc., a Virginia corporation composed by fruit growers in Frederick County, Virginia, and the adjoining counties of Clarke, Warren and Shenandoah, was joined in the litigation by Washington County Fruit Growers Association, Inc., a Maryland corporation composed of fruit growers in Washington County, Maryland, along with Valley Growers Cooperative, Inc., a New York non-profit apple growers cooperative, and Mid-Hudson Growers Cooperative, Inc., also a New York non-profit apple growers cooperative.

The district court in the *Frederick County* litigation held that the Puerto Rican workers were available but nonetheless granted the relief requested by the growers because of the court's concern that the crop would be lost without adequate workers to bring it in. In announcing its conclusions of law the court in the *Frederick County* case stated: "The Court is also impressed by the arguments of Counsel for the Plaintiff that certification of these [foreign] workers will do no violence to the domestic workers that are willing and available to work".[17] PRDOL had recruited 1,094 Puerto Rican workers by August 14, 1978, and by September 1, 1978, had recruited a total of 2,318 workers, the full number called for in the job orders transmitted to Puerto Rico.

The complaint in the instant case alleged that, of the total number of 2,318 workers recruited by PRDOL, only 992 workers actually arrived on the mainland and that the remainder never left Puerto Rico because of oral advice from USDOL requesting cancellation of flights because many of the growers had refused to employ Puerto Rican workers who had already arrived. The complaint also alleged that, of the 420 workers who arrived at the Virginia orchards, fewer than thirty were employed three weeks later. Complaint ¶ 64; J.A. 17-18.

In light of the foregoing it is simply impossible to maintain that the Commonwealth's action involves merely a handful of private employment disputes. The resistance to PRDOL's referral efforts in 1976 and 1977, the concerted attempt to have Puerto Rican workers declared unavailable in 1978 even after

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[17] Transcript of September 5, 1978 hearing on motion for preliminary injunction in Frederick County Fruit Growers Ass'n., Inc. v. F. Ray Marshall, Civil Action No. 78-0086(H) (U.S. District Court for the Western District of Virginia), at page 310. In their Memorandum of Points and Authorities In Support of Plaintiff's Motion for a Mandatory Temporary Restraining Order, plaintiffs offered the following assurance:

> Finally, the issuance of such an order would in no way prejudice any U.S. worker who desires to work in the apple harvest. The employment of temporary foreign workers in accordance with federal law would *not* relieve the Plaintiffs in their responsibility to hire qualified and available domestic workers.

Memorandum, at 8.

the growers had been exempted from Public Law 87, and the massive terminations and refusals to hire in the 1978 harvest involve allegations of an industry-wide attempt to discourage participation by Puerto Rican workers in the East Coast apple harvest.

The underlying interest of the Commonwealth is not vague or speculative. Unlike the desire for a free flow of information critical of state-operated mental health programs which the court rejected as a proper quasi-sovereign interest in *Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center,* 356 F.Supp. 500 (E.D.Pa. 1973), the interest of the Commonwealth in being able to refer unemployed workers to the mainland for employment in connection with a major crop is immediate and direct. Referral of unemployed workers is not a matter of indifference to Secretary Barez, on whose relation this action is brought, for he is charged by law with providing opportunities for profitable employment of Puerto Rican laborers.[18] The growers' actions do far more than simply touch upon his area of responsibility, as in *United States ex rel. Chapman v. Federal Power Commission,* 345 U.S. 153 (1953), where standing was recognized, for the Secretary PRDOL has a special duty under the 1978 amendment to Public Law 87 to guarantee compliance, by growers exempted from Public Law 87, with conditions set forth in job offers circulated to Puerto Rico through the Interstate Clearance System. State law, of course, is not conclusive on the federal question of standing but, in testing the adequacy of the state interest, it is appropriate to examine the nature of the functions of a state official and that determination is derived from state law. *Land O'Lakes Creameries, Inc. v. Louisiana State Bd. of Health,* 160 F.Supp. 387 (E.D. La. 1958).

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[18] The statute establishing the Commonwealth Department of Labor and Human Resources provides that the Department "shall patronize, encourage and develop the interests and welfare of the laborers of Puerto Rico, shall make efforts to improve their living and working conditions, and shall promote their opportunities to obtain profitable employment." P.R. Laws Ann. tit. 3, § 305. The Secretary of Labor is charged with direction, administration and general supervision of the department and is the head thereof. P.R. Laws Ann. tit. 3, § 306.

Nor is the Commonwealth legislature indifferent to the referral of unemployed workers to the mainland in connection with employment in a major crop. In the Preamble to the 1978 amendment to Public Law 87, the legislature noted that "the number of workers hired in United States farms has dropped progressively and alarmingly," and that there exists "a great mass of potential workers available and willing to obtain lucrative employment." J.A. 34.

Analysis of the complaint makes clear that this action does not involve a mere vindication of the rights of individual workers. In the first place the acts complained of with respect to named individual workers are simply illustrative of unlawful conduct engaged in on a broad scale. Individual workers do not stand to benefit financially from this case because money damages are not sought. The Commonwealth seeks instead declaratory and injunctive relief which would shift responsibility for compliance onto the growers to respect national policy relating to the preference for domestic workers, but that relief would run to the "great mass of potential workers available and willing to obtain lucrative employment."[19] The Commonwealth has a profound underlying interest in this controversy, and it is plainly not acting in the role of a volunteer to redress purely private grievances.

Petitioners urge upon this Court the numbers analysis adopted by the district court. Brief for Petitioner, 19-21. In denying standing the district court concluded that "relatively few residents of Puerto Rico were harmed directly by the alleged activities of defendants. At best, only 787 persons out of a total population of 2,712,033 were so affected." 469 F.Supp. at 934, Pet.App. at A-13. This segment of the population, the district court concluded, "falls far below the 'substantial majority' suggested by some courts." *Id.* Petitioners go further. They argue that even if all 2,318 Puerto Ricans allegedly referred to the East Coast apple growers in 1978 were

[19]The Complaint alleged that in September 1978 overall adult unemployment on the island of Puerto Rico was 18.5 percent while rural unemployment was running at a rate of 23 percent. Complaint ¶ 4; J.A. 3.

deemed affected by the alleged actions of the thirty-two Virginia growers, that number constituted less than 0.1 percent of Puerto Rico's 1970 population and is also insufficient. Brief for Petitioner, 19.

This Court in *parens patriae* actions has never imposed the strict numbers computation for which petitioners contend. In *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), an original jurisdiction case brought by a state against private citizens of another state, Georgia sought to enjoin the defendant copper companies from discharging from their Tennessee works sulphuric fumes which were carried by the prevailing winds over Georgia territory. Defendant companies argued as a prerequisite to such an action that "the entire body of the citizens of the complaining state should be affected." 51 L.Ed. at 1041. Without inquiring into the number of Georgia's citizens affected, the Court granted standing, noting:

> The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.

206 U.S. at 237. And, in *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945), the Court adhered to its approach in *Tennessee Copper*, focusing on the nature of the interest asserted and not on the number of citizens directly affected:

> This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants. This is a suit in which Georgia asserts claims arising out of Federal laws and the gravamen of which runs far beyond the claim of damage to individual shippers.

324 U.S. at 452. The number of citizens involved in a controversy has been a factor utilized by this Court in suits between states as a means of identifying efforts to circumvent the Eleventh Amendment for the benefit of individual citizens.

A showing that a large portion of the population is affected serves as a practical indication that the state is not suing on behalf of private interests. *See e.g., Colorado v. Kansas,* 320 U.S. 383, 392-93 (1943); *North Dakota v. Minnesota,* 263 U.S. 365, 374 (1923); *Pennsylvania v. West Virginia,* 262 U.S. 553, 592 (1923).

Apart from Eleventh Amendment considerations, however, the number of citizens affected is but one factor taken into account in *parens patriae* actions to determine whether the wrongs complained of "are such as affect the public at large." *In re Debs,* 158 U.S. 564, 586 (1895). Were a strict numbers computation adopted, the category of quasi-sovereign rights capable of vindication in *parens patriae* actions would be severely eroded. No action *parens patriae* by Georgia would have lain against either the railroads or the copper companies under a strict numbers computation and, we submit, the denial of such state demands would take on constitutional implications.[20]

The court of appeals recognized that while the number of citizens affected is a factor to be considered in determining *parens patriae* standing, the district court construed this factor

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[20] As Mr. Justice Holmes observed in the *Tennessee Copper* case,

> [S]ome such [State] demands must be recognized, if the grounds alleged are proved. When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still-remaining quasi-sovereign interests; and the alternative to force is a suit in this court.

Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907). Similarly, in the instant controversy the only remedy available to the Commonwealth is this action. The Secretary USDOL is not authorized by statute to seek injunctive relief against employers for violations of temporary labor certification regulations nor to impose penalties. In addition, because of its lack of voting representation in Congress, political remedies are unavailable to the Commonwealth as a practical matter. Thus, for example, the ability to commission a report by the Comptroller General, such as the report from which the growers have quoted excerpts in their petition for certiorari, 5 n. 3, and which they have cited in their brief on the merits, 19, n. 7, is a device essentially unavailable to the Commonwealth.

too narrowly in focusing solely on the number of workers directly affected by Virginia growers in the 1978 harvest. As the court of appeals observed:

> Although a parens patriae representation requires that a substantial portion of the citizens of the sovereign be affected, this requirement is satisfied whether they are affected directly or whether they are indirectly affected. There has never been cast a hard and fast game of numbers. Parens patriae standing is appropriate where a sovereign seeks to protect a vital aspect of the general welfare of a substantial portion of its citizenry from serious, harmful, offensive conduct. It is the magnitude and the pervasiveness of the societal harm that must be weighed—not the directness of the injury to particular individuals.

632 F.2d at 370, Pet. App. at A-25 (footnote omitted). The court observed that the number of farm workers temporarily employed annually does not accurately measure the potential effect of the damaged recruitment efforts on all of Puerto Rico's citizens. Rather than "sidestepping" the issue, as petitioners claim, the court of appeals simply recognized that the adequacy of the state interest cannot be determined solely by an inquiry into the number of citizens directly harmed.

The Commonwealth has *parens patriae* standing not simply because nearly 787 Puerto Ricans were injured by the alleged conduct but because that number represents virtually all of the workers referred by PRDOL to the Virginia growers, and illustrates the capability of the growers to undermine the Commonwealth's entire recruitment effort. The complaint alleged that 787 Puerto Rican workers had been recruited by PRDOL to work for defendant growers but that fewer than thirty had employment three weeks later. Complaint ¶ 64, J.A; 17-18. The Commonwealth is complaining of a pattern of conduct by the Virginia growers which frustrated its entire recruitment effort.

The same pattern of conduct occurred in New York. In the complaint in *Bramkamp* (filed simultaneously in New York with the complaint in the instant case), the Commonwealth

alleged that 611 Puerto Ricans were recruited by PRDOL to work for the defendant New York growers but only 386 actually left Puerto Rico owing to refusal by the growers to hire Puerto Ricans who had already arrived. Of these 386 workers, fewer than fifty were employed in the New York orchards three weeks later.[21] Here again the result was a frustration of the Commonwealth's entire recruitment effort. In effect, the actions of defendant growers proclaimed that they desire to employ foreign workers and that Puerto Ricans need not apply. The court of appeals rightly characterized the alleged actions by the growers as "deliberate efforts to stigmatize the labor force as inferior." 632 F.2d at 370, Pet. App. at A-24.

The Commonwealth's action is thus founded on a number of interests implicated by the growers' actions: the injury to 787 adversely affected workers;[22] the injury to an indeterminate number of unemployed Puerto Rican farm workers discouraged from seeking jobs with the Virginia growers in the harvests after 1978 and who lack interests definite enough to enable them to bring legal actions; the injury to an indeterminate number of unemployed Puerto Rican farm workers who may wish to secure work in future apple harvests; and, should growers of other major crops, such as tobacco or sugar, conclude that the statutory preference for domestic workers need not be observed with respect to Puerto Rican workers, the injury to an indeterminate number of unemployed Puerto Rican farm workers who may fail to secure work in connection with such other major crops. While the impact on the economy of Puerto Rico and the public fisc is not precisely calculable, it is certainly not speculative. To the extent that hundreds or thousands of employment opportunities— even part-time employment opportunities—are each year unlawfully withheld from Puerto Rico, the economy suffers, the flow of public funds for unemployment benefits is substantially increased while income tax revenues are reduced, and the welfare of the general population is impaired.

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[21] Petition for Certiorari in Bramkamp v. Commonwealth of Puerto Rico ex rel. Barez, No. 81-361, at 21a.

[22] Were the New York growers subject to the jurisdiction of the United States District Court for the Western District of Virginia, the number "787" would read "1398."

The court of appeals was correct in stating that the test is not in the numbers alone but in the magnitude and pervasiveness of the societal harm. The Commonwealth's underlying interest transcends the interests of the workers harmed in the 1978 harvest and permits this action.

B. Suits by Puerto Rican Workers for Individual Grievances Suffered in the 1978 Harvest Are Inadequate to Remedy the Commonwealth's Quasi-Sovereign Interest and Are Disproportionate in Relation to the Industry-Wide Conduct Alleged by the Commonwealth

Among the factors traditionally considered in determining whether a state has standing *parens patriae* is the presence of a more appropriate party or parties capable of bringing suit. This notion is said to be derived from the traditional concept of *parens patriae,* i.e., the King's power as guardian of persons under legal disability. *Commonwealth of Puerto Rico ex rel. Quiros v. Bramkamp,* 654 F.2d 212, 217 (2d Cir. 1981), *petition for cert. filed,* 50 U.S.L.W. 3302 (1981). *Parens patriae* standing has been recognized even though remedies are available to aggrieved private parties, *Georgia v. Pennsylvania R. Co., supra,* but where complete relief can be secured through suits by the parties actually aggrieved it has been said that the arguments for *parens patriae* standing become less compelling. *Pennsylvania ex rel. Shapp v. Kleppe,* 533 F.2d at 675 n. 42 (dictum).

Petitioners argue that adequate remedies are available to the affected workers in the local courts of Puerto Rico, through class actions in the federal courts, and through the Employment Service Complaint System, 20 C.F.R. Part 658, established by USDOL to investigate violations of Employment Service regulations. Brief for Petitioners, 29-31. The court of appeals rejected the contention that individual workers are in a better position to litigate the issues here, noting that the migrant farm workers are so destitute that they leave their homes for two or three months each year to seek employment. 632 F.2d at 370, Pet.App. at A-25. The Second Circuit also rejected the growers'

contentions on this point, observing additionally that the interests of the individual laborers deprived of employment in 1978 are not necessarily co-extensive with those of the public which the Commonwealth represents. The court stated:

> Thus, even if the workers could marshal the resources to institute and effectively prosecute actions or a class action in their own behalf, there is no assurance that all named defendants herein would be sued or that relief against widespread and future discrimination would be actively pursued.

654 F.2d at 217. Both circuits were correct in holding that establishment of the rights of future migrant laborers, and the underlying quasi-sovereign interest implicated therein, should not depend upon possible relief obtained by individual workers injured in the 1978 harvest.

Petitioners argue that the court of appeals could have concluded that the workers were not in a position to litigate the issues effectively "only by refusing to acknowledge the numerous lawsuits already brought by the Puerto Rican workers." Brief for Petitioners, 33. But, just as petitioners have adopted a view of the complaint which is constricted, their view of this aspect of the standing question is also constricted, based as it is in the assumption that the Commonwealth's interest is only in the grievances of workers in the 1978 harvest. It is plainly not the quasi-sovereign interest of the Commonwealth to secure money damages for 787 workers, because money damages are not sought. Neither is it the Commonwealth's underlying interest to obtain declaratory judgments so that it may maintain a reputation for fulfilling moral undertakings to its citizens. The underlying interest of the Commonwealth is this: that it be able, each year, to recruit substantial numbers of unemployed Puerto Rican farm workers and refer them to temporary jobs in the large East Coast apple orchards,[23] with assurance that the national policy of preferring domestic workers to foreign workers has been established. Individual workers injured in the 1978 harvest do not necessarily share this interest.

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[23] There are thirty-two orchards in Virginia named in the complaint and thirty in New York.

Moreover, there are several reasons why individual actions are not effective to remedy the Commonwealth's underlying interest. First, the award of money damages against a grower is, as noted above, unrelated to the Commonwealth's quasi-sovereign interest. As a *post hoc* remedy, money judgments against individual growers would not necessarily insure establishment of the national preference for domestic workers which is sought to be achieved.

Second, the fact that a forum is available does not mean that effective relief is available. Asserting that adequate remedies are available to the Puerto Rican workers, petitioners cite a long list of civil actions brought by Puerto Rican workers against some of the defendant Virginia growers in various divisions of the Superior Court of Puerto Rico. Brief for Petitioner, 29 n. 13. But petitioners nowhere advise the Court of their belief that, because there appears to be no basis for the exercise of personal jurisdiction, default judgments entered therein against defendant growers are unenforceable in Virginia and New York.[24]

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[24] In an affidavit given in Juan Valderrama Rios v. F. Ray Marshall, No. 79 Civ. 5711 (S.D.N.Y., filed October 22, 1979), petitioners' attorney states, in pertinent part:

> As a result of certain events during the 1978 harvest season, certain Puerto Rican workers filed suits in the courts of Puerto Rico against a number of the defendant apple growers in this case, claiming that their contracts of employment had been breached. I advised these defendant apple growers that they should not enter appearances in these cases for two basic reasons. First, based on past experiences, I felt that the cost of defending these law suits in the courts of Puerto Rico, where all the pleadings would have to be in Spanish, would far exceed any possible recovery against the defendant apple growers who had been sued in those cases. Secondly, there did not appear to be any basis for the courts of Puerto Rico to exercise personal jurisdiction over the defendant apple growers. Therefore, we felt that, even if default judgments were obtained, we could raise the issue of lack of personal jurisdiction when the Puerto Rican plaintiffs attempted to enforce the judgments in the courts of New York.

Supporting Affidavit of S. Steven Karalekas, dated August 5, 1980, Attached to Defendant Apple Growers Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction.

With respect to *Juan Valderrama Rios v. F. Ray Marshall,* Civ. No. 79-5711 (S.D.N.Y., filed October 22, 1979), the class action which petitioners point to as one of the remedies available to the affected Puerto Rican workers, the New York grower defendants in that case, who are represented by counsel for petitioners in this case, have taken the position that plaintiff workers may not bring a class action against apple growers with whom they had no dealings on behalf of workers who did have dealings with those growers. Counsel in *Valderrama Rios* argues that the action "involves an aggregation of individual claims that particular workers may have against particular apple growers," and, because plaintiffs in that case have not properly alleged a conspiracy, "each plaintiff would have standing to sue only the apple grower which [sic] has allegedly subjected him to discriminatory treatment."[25]

Another remedy available to affected Puerto Rican workers, petitioners assert, is the Employment Service Complaint System established by USDOL to investigate violations of Employment Service regulations. But petitioners do not even mention, much less come to terms with, the directly contrary position of the Secretary USDOL who administers the Employment Service Complaint System. In Brief for the Secretary of Labor as Amicus Curiae in the *Bramkamp* case,[26] the Secretary concludes that the Commonwealth's asserted interest in protecting its right to full participation in the Employment Service System neither infringes on nor is inconsistent with federal

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[25] Defendant Apple Growers' Reply to Plaintiffs' Motion for Class Certification at 5, 8, filed November 17, 1980 in Juan Valderrama Rios v. F. Ray Marshall, Civ. No. 79-5711 (S.D.N.Y.).

[26] Resp. App. 1a-11a. Following oral argument in *Bramkamp* before the Second Circuit, that court requested the Solicitor General of the United States to file a brief as amicus curiae on behalf of the appropriate government agency on the issues raised in the case. Because the Secretary of Labor has the principal federal responsibility for administration of the federal-state employment service system, and because of the Secretary's role in certifying the use of temporary foreign workers, the brief amicus was submitted by the Secretary of Labor.

interests. Concerning the complaint system, the Secretary states:

> [R]egardless of the efficacy of the [employment service complaint] system in handling individual complaints, these procedures were not intended to redress Puerto Rico's allegations of systemic mistreatment of Puerto Rican workers. The allegations in this complaint illustrate the difficulty the Department would have in investigating an alleged pattern of misconduct involving hundreds of workers and dozens of employers spread over one or more states. These allegations, if true, would constitute violations of law which could entitle plaintiff to an injunction enforceable by contempt proceedings.

Id., at 8a-9a. As the Secretary observed, the allegations of the Commonwealth involve systemic mistreatment of Puerto Rican workers and it is that type of conduct which transcends the individual complaints and implicates the Commonwealth's underlying, quasi-sovereign interest. Suits brought by individuals would be "wholly inadequate and disproportionate" as remedies for such conduct. *See Missouri v. Illinois*, 180 U.S. 208, 241 (1901). The interest of the Commonwealth lies not in remedies after-the-fact but in being able to refer Puerto Rican workers to jobs in future East Coast apple harvests. Even if individual Puerto Ricans based in the Commonwealth could utilize to effect the complaint procedure against growers based in Virginia, it is simply not designed to handle allegations of harmful industry-wide conduct.

C. The Nature of the Commonwealth's Underlying Interest Is Not Altered by the Possibility That Proof of Systemic Mistreatment May Involve Evidence of Conduct Toward Individuals

Petitioners finally argue that the individual and personal nature of the Commonwealth's claim is revealed by the fact that the allegations of the complaint involve conduct respecting particular individuals. Thus, petitioners argue, a court would have to examine the facts surrounding each employer-employee relationship to determine whether termination was justified in

each case. Brief for Petitioners, 25-27. Because the case involves different sets of facts and circumstances, petitioners assert, it is no more than an attempt to litigate the personal claims of a mere handful of Puerto Rican citizens in the guise of a *parens patriae* lawsuit.

There are two answers to this contention. First, the entire notion of *parens patriae* actions involves standing of states to bring suits on behalf of citizens in a representative capacity by reason of some injury that affects the population in a general way. *See Pennsylvania ex rel. Shapp v. Kleppe,* 533 F.2d at 673. The alleged harm must have its impact somewhere, however, and it is the point of impact which will be the subject of proof. In *Georgia v. Tennessee Copper Co., supra,* the state's case was presumably made out through evidence concerning the effects of sulphur dioxide on particular areas of land adjoining the Tennessee border. Because the Commonwealth in the instant case complains that its attempt to refer 787 Puerto Rican workers was frustrated by the acts of defendant growers, the case will be made out through evidence of actions taken by the growers respecting those workers although the relief sought runs to Puerto Rican agricultural workers in the future. "Injury to the collective will commonly include injury to members of the collective." *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 269 (1972) (dissenting opinion). The fact that the proof necessarily involves particular individuals does not alter the Commonwealth's underlying interest or convert the nature of the action into an action solely for the benefit of such individuals.

Neither does the fact that the proof involves a number of defendants in their relationships with individual workers alter the essential nature of the action. While proof might be easier were there a single, monolithic source of injury, the courts are familiar with cases involving multiple defendants. In fact, the evidence may disclose common patterns of conduct toward Puerto Rican workers. In any event, petitioners are arguing matters of proof while the question in this Court involves the propriety of the motion to dismiss.

Throughout this controversy petitioners have insisted that the massive resistance to the hiring of Puerto Rican workers in the 1978 apple harvest gives rise to nothing more than individual grievances. The workers, they say here, have a forum in the courts of Puerto Rico for breach of contract claims, but in the actual proceedings personal jurisdiction is denied. The workers, they contend, are able to resort to class actions to vindicate their grievances, but in the actual proceedings the New York growers deny the validity of certifying the class. The Commonwealth, they say, may not bring this action *parens patriae* for the grievances are strictly individual. At the same time, however, it has pleased the growers to join together through their associations in an effort to have Puerto Rican workers declared unavailable under U.S. law by reason of the "onerous" provisions of Public Law 87 and then, following the 1978 amendment to Public Law 87, to join together again to have Puerto Rican workers declared unavailable because the growers had not been properly exempted from the provisions of Public Law 87. We submit that in the face of such conduct, directed toward Puerto Rican workers as a class, the Commonwealth is entitled to take up the cause, and that the court below, as well as the Second Circuit, was correct in deciding that standing exists in the Commonwealth as *parens patriae.*

CONCLUSION

For the reasons set forth, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 80-1305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALFRED L. SNAPP & SON, INC., *et al.*,
Petitioners,

v.

COMMONWEALTH OF PUERTO RICO
On the relation of
PEDRO BAREZ, SECRETARY, DEPARTMENT OF
LABOR AND HUMAN RESOURCES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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---

REPLY BRIEF FOR PETITIONERS

Petitioners Alfred L. Snapp & Son, Inc., *et al.*, submit this Reply Brief in response to the Brief of Respondent, Brief of Amicus Curiae Commonwealth of Massachusetts, *Amicus Curiae* Brief of the State of New York, Joined by the Commonwealth of Pennsylvania, in Support of Respondent, and Brief for Migrant Legal Action Program, Inc., *et al.*

ARGUMENT

I. The Commonwealth Has Given a Distorted Explanation of the Events Prior to 1978.

The Commonwealth has presented a distorted history of events prior to 1978 in an attempt to color the nature of its case. The Commonwealth claims that ". . . it has attempted since 1976 to refer agricultural workers to East Coast apple growers through the Employment Service System" but that "[t]hese attempts were unsuccessful because of resistance by the growers to the employment of Puerto Rican workers . . . During 1977, because of grower litigation over Puerto Rican Public Law No. 87, only ninety-three Puerto Ricans were referred to East Coast growers." Brief for Respondents, at 4-5 (footnote omitted).[1]

The history of Puerto Rico's attempts to refer Puerto Rican workers to the East Coast apple harvest actually begins in 1975. In that year, representatives of apple growers in 10 East Coast states "attempted to negotiate a contract with the Puerto Rican authorities but were unable to reach agreement on all of the terms." *Galan v. Dunlop*, 411 F. Supp. 268, 270 (D.D.C. 1975), *appeals dismissed as moot and remanded with order to vacate sub nom. Galan v. Usery*, 551 F.2d 467 (D.C. Cir. 1977) (unpublished). As a result, the U.S. Secretary of Labor "determined that Puerto Rican workers were not available for the apple growers" and certified the growers' needs for temporary foreign workers. *Id.* On the very eve of the apple harvest, a group of Puerto Rican agricultural workers filed suit seeking to enjoin the U.S. Secretary of Labor and the Commissioner of Immigration and Naturalization from permitting the

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[1] This theme is also echoed in the *Amicus Curiae* Brief of the State of New York which refers to "repeated resistance over several years to Puerto Rico's efforts to secure jobs for its migrant workers in the annual east coast apple harvest. . . ." *Id.* at 7.

growers to bring in foreign workers.[2] *Id.* The U.S. District Court for the District of Columbia, however, held that the U.S. Secretary of Labor had a "clear factual basis . . . to certify the need for the importation of foreign farm workers. . . ." *Id.* at 271. The court noted that ". . . the laws of Puerto Rico make it difficult for its workers to enjoy the benefits of the interstate clearance system . . . Puerto Rico is the only participating jurisdiction in the interstate clearance system which has sought to intervene in the employer-employee relationship." *Id.* Thus, in 1975, the decision to consider Puerto Rican workers not "available" was made by the U.S. Secretary of Labor, the litigation challenging that decision was brought by Puerto Rican farmworkers, and the court hearing the case upheld the U.S. Secretary of Labor's decision.

In 1976, apple grower associations negotiated with the Commonwealth about hiring as many as 1,000 Puerto Ricans and actually hired 613 Puerto Rican workers. Brief for Respondent, at 4-5. In 1977, the U.S. Secretary of Labor again took the position that Puerto Ricans would not be considered "available" for purposes of certification as long as the requirements of Puerto Rico Public Law 87 remained in effect. A number of Puerto Rican workers brought suit against the Secretary of Labor of Puerto Rico, the U.S. Secretary of Labor, and the Commissioner of Immigration and Naturalization, this time in the U.S. District Court for the District of Puerto Rico. *Hernandez Flecha v. Quiros*, 567 F.2d 1154 (1st Cir. 1977), *cert. denied*, 436 U.S. 945 (1978).[3] The district court issued a preliminary injunc-

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[2] The *Galan* case was brought on behalf of the Puerto Rican workers by the Migrant Legal Action Program, Inc., the Puerto Rico Legal Services, and Mid-Hudson Valley Legal Services (now Farmworker Legal Services of New York, Inc.).

[3] The *Flecha* case was brought on behalf of the Puerto Rican workers by the Puerto Rico Legal Services and the Migrant Legal Action Program, Inc., who also brought the *Galan* case.

tion requiring the U.S. Secretary of Labor to declare Puerto Rican workers available with the full protection of Puerto Rico Public Law 87, but, on appeal, the First Circuit stayed the injunction and then reversed on the merits. *Id.* The First Circuit concluded that Puerto Ricans, because of the special demands of Public Law 87, were not to be considered "available" domestic workers when determining the number of alien workers needed for migrant agricultural work. This determination was made by the U.S. Secretary of Labor, was challenged in court by Puerto Rican workers, and was upheld by the First Circuit. Although the Farm Labor Executive Committee, representing apple growers in 10 East Coast states, intervened as a defendant in the *Galan* case in 1975 and filed an *amicus curiae* brief with the First Circuit in the *Flecha* case in 1977, neither case could be characterized as "grower litigation over Puerto Rico Public Law No. 87."[4] Brief for Respondent, at 5.

II. The Commonwealth Exaggerates Its Role in the Temporary Foreign Labor Certification Program Which Is Severely Circumscribed by the Regulations.

The Commonwealth contends that the Puerto Rico Secretary of Labor has a "special duty" to guarantee that growers exempted from Puerto Rico Public Law 87 comply with the conditions set forth in job offers circulated

[4] The U.S. Secretary of Labor refused to certify the growers' needs for temporary foreign workers on the ground that the preliminary injunction issued in the *Flecha* case on August 15, 1977 barred such action. The federal court in Puerto Rico stayed its preliminary injunction on August 23, 1977 (only to reinstitute it later), but the U.S. Secretary of Labor still refused to certify the growers. A number of apple grower associations and individual apple growers filed suit against the U.S. Secretary of Labor on August 24, 1977 seeking a mandatory temporary restraining order compelling the Secretary to certify the growers' needs for temporary foreign workers. *Frederick County Fruit Growers Association, Inc., et al. v. Secretary of Labor Marshall*, No. 77-0104(H) (W.D.Va., filed Aug. 24, 1977), *appeal dismissed as moot* (4th Cir. 1977), *dismissed as moot* (W.D.Va., May 3, 1978).

to Puerto Rico through the Interstate Clearance System. Brief for Respondent, at 17. The Commonwealth, however, points to no federal statute or regulation which imposes such a "special duty" on the Puerto Rican Secretary of Labor for the simple reason that there is none it can point to. Neither the Immigration and Nationality Act nor any regulation promulgated thereunder assigns any role in administering the temporary foreign labor certification program to the Commonwealth of Puerto Rico, responsibility resting solely in the Commissioner of Immigration and Naturalization and the U.S. Secretary of Labor. *See* 8 C.F.R. §§ 2.1 and 214.2(h)(3) (1978) and 20 C.F.R. Part 655 (1978). Since the U.S. Department of Labor's temporary foreign labor certification regulations require the use of the Interstate Clearance System created pursuant to the Wagner-Peyser Act, 20 C.F.R. § 655.205(a) (1978), the Commonwealth and other labor supply states play an indirect role in the temporary foreign labor certification process. Neither the Wagner-Peyser Act, 29 U.S.C. §§ 49-49k, nor the regulations promulgated thereunder, 20 C.F.R. Parts 653 and 658 (1978), however, assign an active role to a labor supply state in the investigation of employee complaints or in the enforcement of the Wagner-Peyser Act regulations.[5] In fact, the opposite is true. The Employment Service regulations clearly provide that, whenever a state agency receives an employee complaint against

[5] *Amici curiae* Migrant Legal Action Program, Inc. ("MLAP"), *et al.* suggest that ". . . the States can be said to enter implied contracts that by analogy to the express contracts of foreign governments, are tripartite, involving growers, workers, and the workers' government." Brief for MLAP, *et al.*, at 31-32 n.22. The Wagner-Peyser Act regulations clearly state, however, that ". . . neither the ETA nor the State agencies are guarantors of the accuracy or truthfulness of information contained in job orders submitted by employers. Nor does any job order accepted or recruited upon by the [Employment Service] constitute a contractual job offer *to which the ETA or a State agency is in any way a party.*" 20 C.F.R. § 653.108(b)(1) (1978). (Emphasis added.)

an employer in another state, it shall forward the complaint to the state where the work was performed. 20 C.F.R. § 658.412(d) (1978).

In sharp contrast to the "special duty" which it claims in this case, the Commonwealth has argued exactly the opposite when it has been sued by Puerto Rican workers. In *Vasquez v. Ferre*, 404 F. Supp. 815 (D.N.J. 1975), Puerto Rican migrant workers filed suit against the Puerto Rican Department of Labor, various Puerto Rican officials, and officials of the State of New Jersey for alleged violations of the Wagner-Peyser Act, the Civil Rights Act of 1871, and Puerto Rico Public Law 87. It was "the plaintiff's contention that the commonwealth defendants were required by the [Wagner-Peyser] Act and regulations to ascertain whether the New Jersey employees would provide adequate housing and to refuse to refer the Puerto Rican workers to the interstate clearance system unless the minimum standards were met." *Id.* at 820. The Commonwealth pointed out to the court that the Puerto Rico Department of Labor voluntarily carried out a program to provide social services to Puerto Rican farmworkers and attempted to maintain compliance by farmers with their contracts with the workers but, "[i]nsofar as the Wagner-Peyser Act is concerned, this voluntary effort is wholly fortuitous and cannot create obligations under statutes and regulations which do not require it." [6] In

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[6] *Vasquez v. Ferre*, 404 F. Supp. 815 (D.N.J. 1975), Memorandum in Support of Motion for Judgment on the Pleadings (February 5, 1975), at 11. The Puerto Rico Department of Labor further stated that

> On their face, the Wagner-Peyser regulations only apply to the state in which workers are to be employed. And this is as it should be. It would be wholly unreasonable to require a state to inspect housing conditions on the thousands of farms in the many and distant jurisdictions to which its citizens might migrate, particularly when the states receiving these workers plainly have the duty to do so. Indeed, officials of the state from which the workers have traveled would not even have civil authority to enter the housing facilities in other jurisdictions. The argument that the Wagner-Peyser regulations require

granting the Puerto Rico Department of Labor's motion for judgment on the pleadings, the district court held that "the Wagner-Peyser Act and regulations thereunder impose no duty upon the commonwealth defendants to ascertain the housing conditions on the New Jersey farmers, or to refuse to fill the requests for Puerto Rican workers" and that "[n]either the Wagner-Peyser Act nor Puerto Rico Law 87 imposes a duty upon the Puerto Rican officials to enforce the federal statutory rights of migratory workers who accept employment in New Jersey." *Id.* at 821, 824.

III. The Commonwealth Confuses the Assertion of Legal Defenses with the Unavailability of Legal Remedies.

The petitioners' contention that the Puerto Rican workers allegedly aggrieved have adequate remedies avail-

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> Puerto Rican officials to inspect all housing facilities for migrant workers in New Jersey is nothing short of absurd . . .
>
> No state in the union follows its migrant workers to the states in which they find employment. Puerto Rico, a jurisdiction which is poorer than any state and which is located more than a thousand miles from the farm areas where its workers are employed, is the only government which makes any attempt to follow its workers. With its limited manpower and financial resources, it cannot hope to duplicate what an adequate state enforcement program would do in the vast areas of the United States to which Puerto Rican farm workers migrate annually. This is particularly true since an adequate inspection requires repeat visits, as facilities deteriorate from use and occupancy. It would be a perverse result indeed if Puerto Rico's voluntary program were held to create under the federal regulations a duty to which no state in the union is subject.
>
> The Wagner-Peyser regulations clearly and unambiguously place the responsibility for inspecting housing facilities on the states in which migrant laborers are to be employed. To hold that these facilities must also be inspected by officials from each state or other jurisdiction whose workers might occupy the housing would be terribly burdensome, wasteful and unnecessary. If the State of New Jersey had done its job well, plaintiffs would have no complaint.

Id. at 11-12 (footnote omitted).

able to them and have demonstrated their ability to litigate the issues themselves is attacked by the Commonwealth on four grounds. The Commonwealth argues that (1) the award of money damages in individual actions brought by the workers would not achieve the same end as the injunctive relief sought by the Commonwealth, (2) the petitioner apple growers have not conceded that Puerto Rican courts have personal jurisdiction over them, (3) some apple grower defendants have opposed class action certification in cases brought by Puerto Rican workers, and (4) the Employment Service Complaint System established by the U.S. Department of Labor is not designed to handle allegations of harmful industry-wide conduct.[7] Brief for Respondent, at 23-27.

It is true that the suits filed in the local courts of Puerto Rico have sought only money damages, Brief for Petitioners, at 29-30 n.13—a decision over which the petitioners have no control—but the workers are not limited to such relief. In fact, in the purported class action filed against certain New York apple growers and

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[7] This line of argument—that the Puerto Ricans have no available judicial or administrative remedies unless they can bring class action suits in Puerto Rican courts and obtain injunctive relief—finds its ultimate expression in the Brief of MLAP, *et al.* According to MLAP, the 78 cases involving 220 workers filed in Puerto Rico's courts as a result of the 1978 apple harvest "do not encompass the complaints of hundreds more potential plaintiffs." Brief for MLAP, at 46. MLAP further notes that "administrative proceedings have also yielded no relief for Puerto Rican migrant workers, who have been unable to present proof establishing violations to the satisfaction of mainland State investigators. Only a few of the negative determinations have been appealed to the Department of Labor." *Id.* at 47 n.32. Once, a person's failure to file a lawsuit might have meant that he had no grievance, and a person's failure to prove his allegations of wrongdoing might have meant that there was no wrongdoing. Now, however, the fact that a substantial majority of the Puerto Ricans who worked in the 1978 apple harvest have not filed suits against their employers and the fact that those Puerto Ricans who filed complaints with the Complaint System were unable to present proof substantiating their allegations are supposed to imply a lack of adequate remedies.

others in the U.S. District Court for the Southern District of New York, *Juan Valderrama Rios v. Secretary of Labor Donovan*, Civ. No. 79-5711 (S.D.N.Y., filed October 22, 1979), the plaintiff migrant workers have asked the court to "enjoin said [apple grower] defendants from future violations." *Id.*, Second Amended Complaint ¶ 161. The *Rios* case, incidentally, was brought on behalf of the migrant workers by the Farmworker Legal Services of New York, Inc., one of the 10 legal service organizations which has filed an *amicus curiae* brief with the Court. The broad injunctive relief sought by the migrant workers in the *Rios* case certainly belies the modest claims made by *amici curiae* concerning the kind of injunctive relief obtainable by workers. *See* Brief for Migrant Legal Action Program, Inc., *et al.*, at 53-54.

The fact that some of the apple grower petitioners have chosen not to voluntarily subject themselves to the jurisdiction of Puerto Rico's courts does not mean that the Puerto Rican workers are without access to a forum in which to present their grievances. The final determination of whether those growers sued in the courts of Puerto Rico were subject to the personal jurisdiction of Puerto Rico's courts is yet to be made.[8] If the growers ultimately lose the personal jurisdiction issue, the Puerto Rican workers will be able to sue growers in Puerto

[8] The basic issue involved is whether the mere referral of a grower's clearance order to the Commonwealth of Puerto Rico by the U.S. Department of Labor, absent any other contacts by the grower, constitutes the transaction of business under Puerto Rico's long-arm statute or satisfies the "minimum contacts" requirement of *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). Recently, cases have been filed in the local courts of the Commonwealth of Virginia and the State of New York to enforce some of the default judgments obtained in the Puerto Rico courts. Approximately 40 cases have been filed in the General District Court for Frederick County, Virginia. *See, e.g., Miquel Laboy Colon v. Ray D. Rinker Estate*, No. C 82-00396. Two cases have been filed in the Supreme Court of Ulster County, New York, on behalf of 19 Puerto Ricans. *Ramon Luis Escabi Delgado, et al. v. Altamont Farms, Inc.* and *Nelly Rios, et al. v. Altamont Farms, Inc.*

Rican courts; if the growers ultimately win the personal jurisdiction issue, the Puerto Rican workers could always sue in the courts of the states where the employment contracts were performed, as the Puerto Rican migrant workers have done in the case of *Rios v. Donovan, supra*, and the Commonwealth has done in this case and the *Bramkamp* case.[9] Moreover, the jurisdictional issue, however it is finally resolved, does not limit the workers' access to the Employment Service Complaint System.

Similarly, the fact that the growers sued in purported class action suits have opposed class certification does not mean that the Puerto Rican workers have no adequate legal remedies available. The Southern District of New York, where the only purported class action is pending,[10] has not yet ruled on the class certification issue—either to grant or deny class status. Furthermore, the defendant New York growers' opposition to class certification in the *Rios* case is entirely consistent with the petitioners' opposition to the Commonwealth's assertion of *parens patriae* standing in this case. The Commonwealth's assertion that "[c]ounsel in *Valderrama Rios* argues that the action 'involves an aggregation of individual claims that particular workers may have against particular growers' . . . ," Brief for Respondent, at 26, nearly matches the petitioners' statement in this case that "[i]t is clear from the complaint that this lawsuit constitutes nothing more

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[9] The Commonwealth itself chose to sue the New York growers and the Virginia growers in separate actions. The Commonwealth acknowledges the problem of jurisdiction when it notes that "[w]ere the New York growers subject to the jurisdiction of the United States District Court for the Western District of Virginia, the number '787' would read '1398.'" Brief for Respondent, at 22 n.22.

[10] The pending case of *Ceferino Lopez Rivas v. Marshall*, No. 78-2175 (D.P.R., filed Nov. 9, 1979), began as a purported class action against 102 defendant apple growers. The plaintiffs subsequently filed an amended complaint which abandoned the request for class status and voluntarily dismissed the action with respect to 15 plaintiffs and 91 defendant growers. The *Lopez Rivas* case was brought by Puerto Rico Legal Services, Inc.

than an aggregation of individual claims that an indeterminate number (not exceeding 787) of Puerto Rican workers *may* have against 32 individual Virginia apple growers." Brief for Petitioners, at 24-25 (footnote omitted). The arguments against granting class certification to the workers' suits would apply with greater force to denying *parens patriae* standing to the Commonwealth in this case.

Finally, the Commonwealth makes two arguments in response to petitioners' assertion that the Employment Service Complaint System established by the U.S. Department of Labor is another remedy available to Puerto Rican workers. The Commonwealth asserts that its interest in bringing this suit is not inconsistent with the interests of the U.S. Secretary of Labor and that the Complaint System "is simply not designed to handle allegations of harmful industry-wide conduct." Brief for Respondent, at 26-27.

Regardless of whether the Commonwealth's interest is consistent with federal interests, Brief for Respondent, at 26-27, allowing the Commonwealth to proceed as *parens patriae* would certainly not be compatible with the orderly and efficient operation of the Employment Service Complaint System.[11] The regulations provide for investigation by the U.S. Department of Labor either when it has probable cause to believe that an employer has violated the terms of his temporary labor certification or it has received an employee complaint to that effect. 20 C.F.R. §§ 655.210(a) and 658.501 (1978). The regulations also specify that the state employment agency in the state where the violation allegedly occurred will initially investigate any complaint with a right of appeal to the Regional

[11] The Employment Service Complaint System was created as a result of a consent decree settling a lawsuit brought on behalf of migrant farmworkers by the Migrant Legal Action Program, Inc. against the U.S. Secretary of Labor. *NAACP, Western Region v. Brennan*, 360 F. Supp. 1006, 1020 Appendix A (D.D.C. 1973); 42 Fed. Reg. 4722 (Jan. 25, 1977).

Administrator for Employment and Training of the U.S. Department of Labor. 20 C.F.R. §§ 658.416(c) and 658.502(c) (1978). If the Commonwealth were to bring a *parens patriae* lawsuit on behalf of its citizens without allowing the Employment Service Complaint System to adjudicate the complaints, it would be circumventing the very regulatory scheme it is seeking to enforce. If the Commonwealth were to bring a *parens patriae* lawsuit after the complaints had been investigated and found to have no basis, it would be second-guessing a sister state agency and the U.S. Department of Labor and, thus, undermining the Complaint System.[12]

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[12] In the pending case of *Rios v. Donovan, supra,* the U.S. Secretary of Labor, who is a defendant, filed a Memorandum in Response to Plaintiffs' Motion for a Preliminary Injunction Against the Federal Defendants. Attached to that Memorandum was the affidavit of Kenneth Hamlett, Regional Monitor/Advocate for the Employment and Training Administration of the USDOL. In his affidavit, Mr. Hamlett stated that "Mr. Rios' complaint was one of approximately 120 complaints filed by Puerto Rican workers as a result of their experiences in the 1978 New York apple harvest . . . At the present time, all of the 120 complaints have been resolved at the State level of the administrative complaint system. *In all cases, New York State was unable to substantiate the complaints of those workers.* Upon the completion of the State's action, each of the 120 workers was advised of their right to appeal that determination to the Federal Regional Administration. Only ten workers took an appeal." (Emphasis added.)

See also Brief for MLAP, *et al.*, at 47 n.32. To the extent the Employment Service Complaint System has investigated complaints of the Puerto Rican workers and found them to be without substance, the Commonwealth's *parens patriae* suit is, in effect, complaining of the actions of the state agency which made the initial investigation and the U.S. Department of Labor. *Cf.* Brief for MLAP, *et al.*, at 35 n.25. This is made clear in the *Rios* case where the plaintiffs have charged that the U.S. Secretary of Labor and other federal officials have deprived them of their rights under the Wagner-Peyser Act, the Immigration and Nationality Act, the Civil Rights Act of 1964, and the U.S. Constitution "by failing to insure plaintiffs a fair procedure for the resolution of their complaints and by failing to accord plaintiffs substantial justice on complaints filed." *Rios v. Donovan, supra,* Second Amended Complaint ¶ 159.

The Commonwealth made virtually these same arguments in the pending case of *Juan Valderrama Rios v. Secretary of Labor Donovan*, Civ. No. 79-5711 (S.D.N.Y., filed Oct. 22, 1979). The Puerto Rico Secretary of Labor was originally named as a defendant, but the district court recently granted his motion to dismiss on the ground that the Puerto Rican plaintiffs had failed to exhaust their administrative remedies prescribed by 20 C.F.R. Part 658. *Id.*, slip opinion, at 45-47 (S.D.N.Y., Nov. 23, 1981). The Puerto Rican plaintiffs, represented by the *amicus curiae* Farmworkers Legal Services of New York, Inc., had alleged that the Puerto Rico Department of Labor had "grossly mismanaged" the placement process of Puerto Rican workers in connection with the mainland apple harvest in 1978 and 1979. *Id.*, First Amended Complaint ¶ 176. In support of the motion to dismiss, counsel for the Puerto Rico Secretary of Labor argued that

> [t]he exhaustion doctrine teaches that where—as is the case under the Wagner-Peyser Act—Congress has charged an adminitrative [sic] agency with the obligation to enforce a particular statutory scheme and where an administrative mechanism for adjudicating cases arising under that scheme has been created, that that mechanism is the exclusive method for litigating, in the first instance, claims arising under the statutory scheme. Prior resort to that administrative process is an essential prerequisite to judicial review of the plaintiff's claim.

Id., Defendant Quiros' Memorandum of Points and Authorities in Support of Motion to Dismiss or, in the Alternative, to Sever and Transfer, at 17 (July 18, 1980). The Commonwealth alternatively argued that the primary jurisdiction doctrine applied, since, if the plaintiffs were alleging violations of the Wagner-Peyser Act regulations, ". . . resolving those claims will necessarily involve . . . difficult issues of interpretation and application of the extensive regulations promulgated by the U.S. Secretary of Labor . . . [and] such issues are precisely the kind

which the U.S. Secretary of Labor has expertise in resolving. . . ." *Id.* at 20-21. If the Complaint System is capable of resolving worker complaints against the Commonwealth, it would appear to be equally capable of resolving worker complaints against employers.

The Commonwealth makes the additional argument that the Employment Service Complaint System is not designed to handle allegations of industry-wide "systemic" violations, quoting from the Brief for the Secretary of Labor as Amicus Curiae filed with the Second Circuit in the *Bramkamp* case. Brief for Respondent, at 26-27. A "pattern of misconduct," however, can only be established by first proving individual cases of misconduct, and the Employment Service Complaint System is certainly designed to investigate allegations of individual violations. Furthermore, the U.S. Department of Labor has elsewhere claimed a greater authority and responsibility than it did in its *amicus* brief to the Second Circuit. In *Chick Orchards, Inc. v. Secretary of Labor Marshall*, No. 80-0-108P (D. Maine, filed March 28, 1980), the U.S. Department of Labor argued that it had acted properly in bringing an administrative proceeding against a Maine apple grower on behalf of all its workers even though only one had filed a complaint. In its Memorandum in Support of Federal Defendant's Amended Motion for Summary Judgment, at 8-9, the U.S. Department of Labor stated that

> Once the Secretary is aware of an alleged violation of the employment service regulations, either through the filing of a formal complaint or otherwise, he is free to make full inquiry under his broad investigatory powers. Neither the Secretary's investigation nor his findings and determinations is precisely restricted to the complainant or the particularities raised in the complaint . . .
>
> The Secretary's authority to make a full inquiry and determination is necessary in order for the Department of Labor to properly discharge its responsibilities set forth in the Wagner-Peyser Act of 1933,

> as amended, 29 U.S.C. § 49 *et seq.*, to establish and maintain a national system of employment offices to serve employers and U.S. workers. . . .

The Commonwealth does not explain why it would be in a better position to enforce the U.S. Department of Labor's regulations than the U.S. Department of Labor itself. If the Commonwealth has authority to go into court and seek to enjoin violations of U.S. Department of Labor regulations, the U.S. Department of Labor certainly has such authority. *See, e.g., Western Colorado Fruit Growers Association v. Marshall*, 473 F. Supp. 693, 698 (D. Colo. 1979) (". . . the government does have an avenue of relief through the counterclaim for an injunction."). *See also NAACP, Western Region v. Brennan*, 360 F. Supp. 1006, 1013 (D.D.C. 1973) ("The power to issue and enforce the Department of Labor's rules, regulations, and standards of efficiency is 'affirmatively placed upon the Secretary of Labor' and is of 'substantive importance rather than merely procedural and administrative,' " citing 41 Op. A.G. 407, 412 (1959).).

IV. The Commonwealth Uses a Gauze of Collective Words to Mask What Is Nothing More Than An Aggregation of Individual Complaints.

Throughout its Brief, the Commonwealth employs a variety of collective words to mask what its complaint clearly reveals to be nothing more than an aggregation of individual complaints. The Commonwealth refers to actions by "the growers," Brief for Respondent, at 14, 15, 17, 21, 29, mentions the need for "a comprehensive resolution," *id.* at 10, invokes the history of legal disputes prior to 1978, *id.* at 4-5, 14-15, speaks of "industry-wide" conduct, *id.* at 7, 17, 27, talks about a "pattern of conduct," *id.* at 21, 28, refers to "systemic mistreatment of Puerto Rican workers," *id.* at 27, and mentions "the massive resistance to hiring of Puerto Rican workers," *id.* at 29.

The collective terms peppered throughout the Commonwealth's Brief, it should be noted, are not to be found in the Commonwealth's complaint.[13] Moreover, the elusive quality of these terms makes it impossible to determine exactly whom they are intended to cover. When the Commonwealth refers to "the growers" or "the East Coast growers," it is not clear whether the Commonwealth means all apple growers in the 10 East Coast states who intervened in the *Galan* case in 1975, those apple growers who employed the 613 Puerto Rican workers referred by the Commonwealth in 1976, the apple growers who hired the 93 Puerto Ricans referred by the Commonwealth in 1977, all the apple growers in the four states to which Puerto Rican workers were referred in 1978 (Virginia, New York, Maryland, and West Virginia), only the apple growers in Virginia and New York (no suit has been filed by the Commonwealth against the growers in Maryland and West Virginia as a result of the 1978 season), or only the 32 apple growers in Virginia who are defendants in this case. The complaint is clearly directed at the 32 Virginia growers to whom 787 Puerto Rican workers allegedly were referred in 1978. *See* Complaint ¶¶ 72, 74 and 76 (J.A. 27-29).

Similarly, the Commonwealth uses phrases such as "industry-wide" conduct, "patterns of conduct," "systemic mistreatment," and "massive resistance" to describe what its complaint clearly reveals to be an aggregation of individual complaints. Again, when the Commonwealth speaks of "industry-wide," it is not clear whether it is referring just to the Virginia apple growers, the Virginia and New York growers, the growers in all four states to which Puerto Ricans were referred in 1978 (Virginia, New York, Maryland, and West Virginia), or the apple growers in all 10 East Coast states (no Puerto Ricans were

[13] The only exception is the reference to the agreement between the Commonwealth Department of Labor and "east coast apple growers" in 1976. Complaint ¶ 61 (J.A. 17).

referred to any of the six New England states in 1978). If there was a "pattern of conduct" in 1978, even in the case of the 32 Virginia growers, the pattern was certainly a checkered one. *See* Brief for Petitioners, at 25-27. Only eight Virginia growers, for example, less than 25 percent of the 32 Virginia growers in this case, allegedly refused to hire some Puerto Rican workers who showed up at their orchards, an allegation which, even if true, hardly amounts to "massive resistance." [14] Brief for Respondent, at 29.

The motley nature of the allegations against the 32 Virginia apple growers does not simply present a "proof problem," as the Commonwealth contends, but manifests "the essential nature of the action." Brief for Respondent, at 28. The complaint alleges a multitude of grievances that vary from worker to worker and grower to grower. *See* Brief for Petitioners, at 25-26. The Commonwealth has expressed a desire for "a comprehensive resolution of the issues posed by this controversy," Brief for Respondent, at 10, but not all disputes lend themselves to "comprehensive resolution." The Court would dismiss out of hand an attempt by the Commonwealth to bring one lawsuit on behalf of Puerto Rican automobile owners involved in traffic accidents on the mainland or an attempt by a state to bring one lawsuit against all landlords within the state on behalf of their tenants to rectify alleged building code violations. The Commonwealth's attempt to litigate a conglomeration of employment disputes by means of a *parens patriae* lawsuit smacks of that approach, a futile search for a comprehensive resolution of

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[14] In the *Bramkamp* case, only three of the 30 New York apple grower defendants allegedly refused to hire Puerto Rican workers who showed up at their orchards. *Commonwealth of Puerto Rico ex rel. Quiros v. Bramkamp*, Civ. No. 79-0199 (S.D.N.Y., Sept. 28, 1979), *rev'd*, 654 F.2d 212 (2d Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3302 (Aug. 20, 1981) (No. 81-361), First Amended Complaint ¶ 71. Each of those three growers are also charged with discriminating against other Puerto Rican workers who were hired by them. *Id.* ¶¶ 71-73.

many disparate individual controversies that turn on their own peculiar facts and circumstances.[15]

CONCLUSION

For the reasons stated above and in the Brief for Petitioners, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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[15] *Cf. Board of Supervisors of Fairfax County, Virginia v. United States*, 408 F. Supp. 556, 566 (E.D.Va. 1976), *appeal dismissed sub. nom. Board of Supervisors of Fairfax County, Virginia v. District of Columbia*, 551 F.2d 305 (4th Cir. 1977) (unpublished):

> Even if the Board of Supervisors could properly act as *parens patriae* in some instances, it could not do so to redress the constitutional torts alleged in the instant case. If the Lorton Complex is in fact operating so as to deprive Fairfax County residents of certain constitutional rights, the injury would be personal to those residents so effected [sic] rather than to any quasi-sovereign interest of the county itself. While the Board of Supervisors is statutorily empowered to abate public nuisances, it is not authorized to redress injuries of a personal nature inflicted upon its residents.

The court also noted that "to be considered public a nuisance must effect [sic] an interest common to the general public rather than peculiar to one individual. See generally, W. Prosser, The Law of Torts § 88 (4th ed. 1971). A wrong to a specific individual, however, may be remedied by an action instituted by that individual." *Id.* at 566 n.14.

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ALEXANDER L. STEVAS

No. 80-1305

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1981

ALFRED L. SNAPP & SONS, INC., et al.

PETITIONERS

v.

COMMONWEALTH OF PUERTO RICO

On the relation of
Pedro Barez, Secretary, Department of
Labor and Human Resources

RESPONDENT

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF AMICUS CURIAE COMMONWEALTH OF MASSACHUSETTS

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February 12, 1982

STATEMENT OF INTEREST

The Commonwealth of Massachusetts has a tradition of actively protecting, as parens patriae, the economic interests of its citizens. See, e.g., Maryland v. Louisiana, U.S. , 101 S. Ct. 2114 (1981); Federal Energy Administration v. Algonquin SNG. Inc., 426 U.S. 548 (1976).[1/] Massachusetts is interested in having the principles governing a state's parens patriae standing defined broadly, so that Massachusetts may continue its traditional policy. Therefore, Massachusetts, acting by its Attorney

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1/ Cf. Appeal of New England Power Co., 424 A. 2d 807 (N.H. 1980), on appeal sub. nom. Commonwealth of Massachusetts v. New Hampshire, No. 80-1471 (intervention by Massachusetts before New Hampshire public utilities commission).

General pursuant to state law[2/] and Sup. Ct. R. 36.5, supports the position of Puerto Rico in this case.

In addition, there are apple growers in Massachusetts who employ seasonal farm workers to harvest apples and who are subject to the Wagner-Peyser Act, 29 U.S.C. §§49 et. seq. (1976), and the Immigration and Nationality Act of 1952, 8 U.S.C. §§1101 et. seq. (1976). At the height of the 1981 apple harvest season, 695 seasonal workers were employed in Massachusetts. Of these, 394 were foreign and 26 were Puerto Rican. If there are any violations of applicable federal laws by growers in this state, Massachusetts has a distinct interest in ascertaining whether Puerto Rico has standing to seek relief in federal court.

2/ Massachusetts Gen. Laws Ann. Ch. 12, §3 (West 1976).

SUMMARY OF ARGUMENT

Puerto Rico seeks to ensure that its large unemployed work force is not denied the opportunity to work in Virginia's apple growing industry. Puerto Rico alleges that the growers violated applicable statutes and regulations in 1978 and will do so in subsequent years, if not enjoined. The impact of these violations falls not just on the individual workers affected in 1978, but also on Puerto Rico's whole body of unemployed adults, any of whom could apply for and obtain work in later years, but for the violations.

Puerto Rico's interest in fostering the economic opportunities of its large pool of unemployed farm workers is no

less substantial than other states' recognized interest in asserting the economic well-being of their farm owners. The Court has permitted a state to represent, parens patriae, the interests of its citizenry in the welfare of one sector of the state's economy. For purposes of a state's standing under Article III, it matters not whether that sector sells farm produce or farm labor.

Joblessness affects not only the individual worker, but also imposes hardship on his dependents and demoralizes society at large. When joblessness is pervasive, as in Puerto Rico, it becomes a matter of strong state interest. Under the principles of parens patriae standing long-accepted by this Court, Puerto Rico must be found to be a proper party.

ARGUMENT

I. PUERTO RICO HAS STANDING IN FEDERAL DISTRICT COURT TO SECURE THE BENEFITS OF FEDERAL LAWS FOR ITS WORK FORCE AGAINST VIRGINIA APPLE GROWERS WHO HAVE ALLEGEDLY VIOLATED THOSE LAWS.

A state may sue as the representative of its citizens, parens patriae, to protect their "health, comfort and welfare." Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923). A state's interest in the prosperity of its citizens and the welfare of its economy is a well established basis for such representative standing.[3/] However, a state may

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3/ See Maryland v. Louisiana, 101 S. Ct. at 2124-25; Georgia v. Pennsylvania R. Co., 324 U.S. 439, 447-52 (1945); North Dakota v. Minnesota, 263 U.S. 365,

(footnote continued)

not assert, as a nominal party, the private claims of its citizens.[4/]

"[A State] may act as the representative of its citizens in original actions where the injury alleged affects the general population of a state in a substantial way. [citations omitted]"

(footnote continued)

374 (1923); Pennsylvania v. W. Virginia, 262 U.S. at 591-92; New York v. New Jersey, 256 U.S. 296, 301-302 (1921); Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907); Kansas v. Colorado, 206 U.S. 46, 99-100 (1907); Missouri v. Illinois, 180 U.S. 208, 241 (1901). Cf. Hawaii v. Standard Oil Co., 405 U.S. 251, 257-260 (1972); Louisiana v. Texas, 176 U.S. 1, 19 (1900).

4/ E.g., Pennsylvania v. New Jersey, 426 U.S. 660, 665-66 (1976); Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387, 395-96 (1938); Kansas v. United States, 204 U.S. 331, 340-41 (1907). But see New York v. Connecticut, 4 U.S. (4 Dall.) 1 (1789)(jurisdiction assumed, but injunction denied).

Maryland v. Louisiana, 101 S.Ct. at 2124. Every citizen of a State need not be aggrieved for "the general population" to be affected for purposes of parens patriae standing.[5/] What is required is that the public welfare, not merely private interests, be affected.

A. Puerto Rico's General Economy Is Affected by the Apple Growers' Noncompliance with Federal Law.

Where injury is caused to one sector of a state's economy, the general welfare of the state is affected as a

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5/ Cf. Pennsylvania v. West Virginia, 262 U.S. at 564 ("[A state] may properly sue to protect the health and comfort of its inhabitants and the value of their property . . . though the danger it seeks to avert does not threaten all of its inhabitants, or does not threaten all of them in like degree. [citations omitted]").

matter of law, as this Court has ruled. For example, in Kansas v. Colorado, it was alleged that Colorado's diversion of water flowing in the Arkansas River caused economic losses to downstream riparian owners in Kansas. As to the affected land, the Court said:

> Its prosperity affects the general welfare of the state. The controversy rises, therefore, above a question of local private right and involves a matter of state interest . . . .

206 U.S. at 99. In North Dakota v. Minnesota, the latter state's activities caused an interstate stream to flood, which damaged the crops and the arable quality of land of farms in North Dakota. The Court did not count the number of farms affected or measure the farms' importance in the state's overall economy, but concluded that North Dakota "has such an interest as quasi-sovereign

in the comfort, health, and prosperity of its farm owners that resort may be had to this Court for relief." 263 U.S. at 374.[6/] In both of these cases, injury to a portion of the agricultural production sector of a state's economy was found to present an injury to the state's general economy. Similarly, here Puerto Rico asserts an injury to the sector of its economy that is engaged in selling its labor power, i.e., its unskilled work force that is available for employment in Virginia's orchards. A state has an interest in preventing economic loss in the sector of its economy which sells its labor power at least as great as its

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6/ Cf. Missouri v. Illinois, 180 U.S. at 241 (substantial impairment of prosperity and health of towns and cities in Missouri on the Mississippi River, because of Chicago sewage in river water, affects entire state).

interest in the sector which sells agricultural produce.[7/] Even if there is a difference in a state's interest in the welfare of its farm workers and its farm owners, it is not so great as to mandate different treatment of a state as litigant under Article III of the Constitution.

B. The Injury to Puerto Rico's Economic Welfare Is Substantial.

Whether or not a state's general welfare is affected "in a substantial way" must be determined by looking at the facts in each case. Adverse effects in the future, as well as in the

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7/ Cf. Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 341-45 (1977)(state agency which "serves a specialized segment of the State's economic community which is the primary beneficiary of its activities" has standing as representative of apple growers and dealers to challenge another state's labelling statute).

present, must be considered. See Pennsylvania v. West Virginia, 262 U.S. at 590-93; New York v. New Jersey, 256 U.S. at 302-303; Georgia v. Tennessee Copper Co., 206 U.S. at 238-39; Missouri v. Illinois, 180 U.S. 208. The degree of injury may be substantial even though large numbers of individuals are not immediately affected. In North Dakota v. Minnesota, for example, the Court did not even indicate the number of farms affected by flooding. In Georgia v. Tennessee Copper Co., the Court found that interstate air pollution caused or threatened enough damage "to the forests and vegetable life, if not to health", without counting the private individuals possibly affected.[8/] It should also

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8/ Although the number of individual natural gas consumers who would have

(footnote continued)

be noted that injury to the economy of a state need not be caused directly by the defendant's action, but may be indirect. See Maryland v. Louisiana, 101 S.Ct. at 2125; Pennsylvania v. West Virginia, 262 U.S. at 564; Missouri v. Illinois, 180 U.S. at 241.

Puerto Rico's complaint alleges a substantial impact on its general welfare. It reveals unemployment levels in Puerto Rico in 1978 at 18.5% for all adults and 23% for rural workers. (J.A. 3) Unemployment in this context is not just a severe personal hardship for an

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(footnote continued)

been affected by West Virginia's statute was noted by the Court in Pennsylvania v. West Virginia, this was done for descriptive, rather than prescriptive reasons. 262 U.S. at 584-85, 590.

individual worker and his dependents, as lack of work always is, but is a social problem as well. It demoralizes employable workers in the general population.[9] It creates a chronic burden for Puerto Rico's welfare system. And because virtually any unskilled worker in Puerto Rico could apply for and obtain a seasonal apple-picking job in future years,[10] the impact of petitioners' alleged denial of job opportunities falls on the entire unemployed work force. It is thus at least as pervasive and debilitating an injury in the Puerto Rican

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9/ See Commonwealth of Puerto Rico v. Alfred L. Snapp & Sons, Inc., 632 F. 2d 365, 370 (4th Cir. 1980).

10/ Such jobs are available all along the East Coast of the United States. See Commonwealth of Puerto Rico v. Bramkamp, 654 F.2d 212, 213 (2nd Cir. 1981).

context as the potential economic losses to farmers were in North Dakota v. Minnesota and Kansas v. Colorado, or the economic costs to consumers in Maryland v. Louisiana.

C. Puerto Rico Has Asserted a Sufficiently Adverse Interest to Establish Standing in District Court.

In arguing that Puerto Rico's complaint, filed in District Court, fails to allege an injury affecting "the general population . . . in a substantial way",[11/] petitioners have misconceived this Court's test for state standing in original jurisdiction cases. This test evolved in cases brought under the Court's jurisdiction under Article III, §2, of the Constitution. This jurisdiction must necessarily be exercised "sparingly", United States v. Nevada,

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11/ Brief for Petitioners, 16-24.

412 U.S. 534, 538 (1973), lest the Court's docket become "inundated", Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1976), and its ability to exercise its appellate jurisdiction become "impaired", Washington v. General Motors Corp., 406 U.S. 109, 113 (1972). The test has therefore been applied rigorously in original actions.

The test need not be applied so strictly in cases filed in District Court. There, it should require that a plaintiff state, like any other litigant, allege a sufficient "stake in the outcome of the controversy as to ensure that concrete adverseness which sharpens the presentation of issues." Baker v. Carr, 369 U.S. 186, 204 (1962). Even if Puerto Rico's complaint could not be filed as

an original action, it nevertheless asserts a sufficiently adverse interest to satisfy the "case or controversy" requirement for standing in District Court, for the reasons discussed above, pp. 9-10 and 12-14.

II. PUERTO RICO IS ASSERTING THE RIGHTS OF ITS WORK FORCE AS A WHOLE, NOT THE PERSONAL CLAIMS OF INDIVIDUALS.

Puerto Rico is seeking to prevent the denial of jobs in Virginia's apple-growing industry to its massive pool of unemployed workers, in accordance with federal statutes and regulations. The injunctive relief sought in prayer 4 of its complaint would enjoin the growers from violating these federal provisions in the future. The beneficiaries of such an injunction are not necessarily the

individuals named in the complaint or those who were referred to the Virginia growers in 1978, but are any of Puerto Rico's thousands of unemployed adults who are capable of doing apple-picking work.12/ Even if some of the workers hired in 1978 assert individual damage claims, Puerto Rico still has standing to seek injunctive relief on behalf of its entire work force and its members. See North Dakota v. Minnesota, 263 U.S. at 374-76. Cf. Hawaii v. Standard Oil Co., 405 U.S. at 356 n.7.

12/ The declaratory relief sought in prayers 1-3 may be seen as ancillary to the injunctive relief sought.

CONCLUSION

Puerto Rico has *parens patriae* standing as representative of Puerto Rican workers to seek to enjoin Virginia apple growers from violating federal laws protecting the job opportunities of these workers. The ruling of the Court of Appeals reversing the dismissal of Puerto Rico's second amended complaint should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I, Anthony P. Sager, Assistant Attorney General of the Commonwealth of Massachusetts, depose and say that on February 12, 1982, I served three copies of the foregoing Brief of Amicus Curiae Commonwealth of Massachusetts on petitioners and respondent by depositing same in the United States post office at Post Office Square, Boston, Massachusetts, with first class postage pre-paid, addressed to their respective counsel of record: Thomas J. Bacas, Esq., and S. Steven Karalekas, Esq., 1250 Connecticut Ave., N.W., Washington, D.C. 20036; Paul A. Lenzini, Esq., Chapman, Duff, and Paul, 1730 Pennsylvania Ave., N.W., Washington, D.C. 20006.

Anthony P. Sager

Anthony P. Sager

Subscribed and sworn to before me at Boston, this 12th day of February, 1982.

Celia C. DeAngelis

Notary Public

My commission expires: 11/14/86

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OCTOBER TERM, 1981

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v.

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Migrant Legal Action Program, et al. hereby move for leave to file the

attached brief as amici curiae in this case pursuant to Rule 36 of the Rules of the United States Supreme Court. The interest of Migrant Legal Action Program, et al. as amici curiae and the reasons the Court should grant this motion are set forth in "Interest Of Amici Curiae," at pages 2-8 of the attached brief.

Counsel for Respondent has consented to the filing of the attached brief, but counsel for Petitioners has refused to give his consent. Copies of Respondent's consent and Petitioners' letter refusing consent have been filed with the Clerk of the Court.

Respectfully submitted,

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February 12, 1982

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INTEREST OF AMICI CURIAE

Amici are ten organizations that are involved on a day-to-day basis with the legal problems faced by migrant farmworkers. Several of the amici are dedicated to the specific purpose of providing legal services to migrant workers. Others have been established to serve a broader-based segment of this country's poor, including but not limited to migrant workers. As explained more fully below, amici and their clients will be significantly affected by the Court's decision in this case. This brief is intended to present the Court with the viewpoint of domestic migrant farmworkers who seek employment in the context of the temporary foreign labor certification process (the "H-2" program) and the organizations that attempt to redress their grievances and to present facts regarding individual litigation under the interstate

employment system that may not be known to the parties.

The Migrant Legal Action Program, Inc. (MLAP), located in Washington, D.C., is a national support center for migrant farmworkers and attorneys representing migrant farmworkers. MLAP is funded by the Legal Services Corporation, and provides free legal assistance to migrant farmworkers and their lawyers. Its overriding goal is the improvement of wages and working conditions of one of the nation's poorest working groups.

MLAP has found that individual domestic workers, whom employers must recruit before turning to foreign workers, cannot realistically pursue claims arising out of their right to employment under the interstate employment system and temporary foreign labor certification regulations. Both the administrative complaint process

and the judicial system are, as a practical matter, inaccessible to the vast majority of these farmworkers, who have no access to legal representation. MLAP, with four staff attorneys, and suffering from a twenty-five percent cut in its budget this year, cannot change this reality. For these reasons, MLAP has a vital interest in this case and in the resolution of the question whether Puerto Rico has standing to redress violations of law in connection with the interstate employment system.

Puerto Rican Legal Defense and Education Fund is a foundation-funded nonprofit corporation that provides legal assistance to the Puerto Rican community. The Fund and its clients have a direct interest in the treatment of Puerto Rican agricultural workers, because class-based discrimination of the sort alleged in this suit affects all members of the Puerto

Rican community. However, because it is located in New York City, the Fund is rarely able to represent rural workers for claims arising in Virginia and other agricultural areas.

The eight other amici are legal aid groups whose clientele include migrant farmworkers. None of these groups, however, either singly or in combination with others has the resources adequately to protect the legal rights of Puerto Rican migrant workers seeking work on the mainland. As their sources of funds dry up, some of these organizations are forced to turn away individual migrant clients. These amici thus have a substantial interest in this case, both because its outcome is likely directly to affect their work and the demands on their limited resources and because of its impact on migrant workers and other poor whom they serve.

Farmworkers Legal Services of New York, Inc. and Virginia Farmworkers Project are funded by the Legal Services Corporation and provide legal services to migrants and other indigent farmworkers in their respective States. Because of budgetary constraints, Farmworkers Legal Services must serve thirteen New York counties from only two offices, one in Rochester and the other in Newburgh, New York.[1/] The Virginia Farmworkers Project office is located in Belle Haven, Virginia, 200 miles from the areas in which migrant workers are employed in H-2 program jobs, which are in the western portion of the State. Only one Virginia Farmworker Project lawyer, who is not licensed to practice in Virginia, is available to serve the migrant workers who come to Virginia.

1/ Budgetary constraints recently caused Farmworkers Legal Services to shut down a third office.

To our knowledge, there are no other legal services attorneys in Virginia who regularly represent migrant workers.

Colorado Rural Legal Services, Florida Rural Legal Services, and Texas Rural Legal Aid are federally funded legal service programs for eligible low-income people who live in rural areas. Their clientele, and thus the recipients of their limited resources, include all the rural poor, of which migrant farmworkers are only a part. Migrant workers have regularly sought assistance from these groups in connection with the interstate employment system and displacement by foreign workers.

Legal Aid Bureau, Inc., Pine Tree Legal Assistance, Inc., and West Virginia Legal Services Plan, Inc. are funded by the Legal Services Corporation and serve low-income people in their respective geographic areas.[2/] All of these groups

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2/ Legal Aid Bureau, Inc. is located in Maryland, and Pine Tree Legal Assistance, Inc. is located in Maine.

have set up migrant farmworker projects to deal with the special problems of migrant workers. But the projects are small, and their offices are often located far from their potential clients, as resources and expertise with the problems of migrant workers are scarce. Legal Aid Bureau, Inc., for example, has one licensed attorney, who is located 200 miles from the sites where migrants are employed in H-2 program jobs. Similarly, the migrant project of the West Virginia Legal Services Plan consists of just one attorney for the entire State.

STATEMENT OF THE CASE

In this suit, the Commonwealth of Puerto Rico seeks to defend the integrity of its statutory employment security partnership with the federal government, to redress discrimination against its citizens as a class, and to protect its economy from

the debilitating effects of continuing statutory violations by mainland United States growers. The issue in this proceeding is whether Puerto Rico has standing to do so and to sue the Virginia growers ("Growers") named in its Complaint.

The federal-State employment partnership giving rise to the Commonwealth's cause of action has its foundations in the Wagner-Peyser Act of 1933, 29 U.S.C. §§ 49-49k (1976 & U.S.C.A. Supp. 1981), and the "H-2" temporary worker provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101(a)(15)(H)(ii), 1184(a), (c) (1976).[3/] Under these laws, Puerto Rican citizens are given preference over aliens who would otherwise be imported by

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3/ Puerto Rico is a "State" for purposes of the laws at issue in this suit. 29 U.S.C. § 49b(b) (1976); 8 U.S.C. § 1101(a)(36), (38) (1976).

employers desiring temporary farm laborers.[4/] The United States Employment Service of the Department of Labor, State employment agencies, and the Interstate Clearance System ("ICS") are components of a federal-State system intended to translate the statutory preference for domestic workers into reality, by bringing jobs and workers from different States together. State employment service offices match employers and employees through "job orders," which are employment offers filed by employers and shown to job-seekers by employment service personnel. Employers recruiting outside their own State file "interstate clearance orders," job orders that are routed through the ICS to those

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4/ See Flecha v. Quiros, 567 F.2d 1154, 1155 (1st Cir. 1977), cert. denied, 436 U.S. 945 (1978); Florida Sugar Cane League, Inc. v. Usery, 531 F.2d 299, 303-04 (5th Cir. 1976); Elton Orchards, Inc. v. Brennan, 508 F.2d 493, 500 (1st Cir. 1974).

States, including Puerto Rico, that are likely to have available workers.

Employers like the Growers here who may wish to hire foreign laborers are required by law to use the Wagner-Peyser Act system and to abide by its requirements and the additional requirements of the temporary foreign labor certification regulations.[5/] These employers must attempt to recruit domestic workers through the interstate system. Generally the employers may hire foreign workers only if they are certified by the Department of Labor, and the Department of Labor may certify foreign workers only if the ICS search does not yield U.S. workers to fill the available jobs.[6/] Certification of

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5/ Those regulations are set out at 20 C.F.R. Part 655 (1981).

6/ INA § 101(a)(15)(H)(ii), 8 U.S.C. § 1101(a)(15)(H)(ii) (1976), provides that aliens may enter the United States temporarily if they are coming to perform

[Footnote continued next page]

foreign workers does not, however, end the preference for domestic workers. The employers remain under an obligation actively to recruit domestic workers at all times before the foreign workers depart for the United States; even after the foreign

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[Footnote continued from preceding page]

temporary work and "unemployed persons capable of performing such services or labor cannot be found in this country." Authority for admitting H-2 aliens is vested in the Attorney General, who is authorized by INA § 214(c) to make determinations as to the availability of domestic workers "after consultation with appropriate agencies of the Government, upon petition of the importing employer." 8 U.S.C. § 1184(c) (1976). "Consultation" with the Department of Labor has been formalized by regulation ever since the H-2 provision was enacted. See Comm. on the Judiciary, 96th Cong., 2d Sess., Congressional Research Service Report on Temporary Worker Programs: Background And Issues 59 (Comm. Print 1980). The Department of Labor requires employers to "test the market" for domestic workers by recruiting through the federal-State employment offices system. Only if that test demonstrates that there is not a sufficient number of domestic workers may aliens be certified for temporary work. See 20 C.F.R. Part 655 (1981).

workers leave their countries to come to their temporary jobs in this country, the employers are required to hire qualified domestic workers who apply during the first half of the job period.

The statutory scheme established by Congress creates a federal-State partnership and places on the States, including Puerto Rico, primary responsibility for bringing domestic workers and employers together.[7/] Pursuant to this statutory mandate, the Commonwealth

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7/ See, e.g., S. Rep. No. 63, 73d Cong., 1st Sess. 4 (1933):

> This bill proposes a scheme of Federal leadership, with the placement work done by the States . . . . The Federal Government is also to do the research work, which is often too expensive for the States to do individually; the function of the States being to perform the task of getting the jobs and the workers brought together. (Emphasis added.)

has established an employment security agency to work with the Department of Labor and regularly appropriates Commonwealth monies in support of the system. In exchange, the Commonwealth receives federal funding under 29 U.S.C. § 49d (1976 & U.S.C.A. Supp. 1981) and the opportunity to place its citizens in mainland jobs. Under federal regulations, the Commonwealth is required to cooperate with and adhere to the policies of the Department of Labor and to maintain an adequate system for the interstate recruitment and transfer of agricultural workers.[8/] Although not required by the federal statutes, the Commonwealth has amended its own labor protection laws to make them more compatible with the federal regulations and to ensure that its citizens qualify as "available" workers entitled to the

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8/ See 20 C.F.R. §§ 602, 603 (1981).

statutory preference over foreign workers.[9/]

The Complaint in this action alleges that, during the 1978 harvest, the

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9/ In 1962, Puerto Rico enacted its Public Law 87, P.R. Laws Ann. tit. 29, §§ 526 et seq. (1966), to protect Puerto Rican migrant agricultural workers from discriminatory and abusive treatment by mainland employers. Public Law 87 requires employers to enter into written contracts with the workers, providing for certain minimum employment conditions. In 1977, the United States Court of Appeals for the First Circuit upheld the U.S. Labor Department's position that these minimum conditions, which are more exacting than those required by federal regulations, rendered Puerto Rican workers "unavailable" under the H-2 provision. Flecha v. Quiros, 567 F.2d 1154 (1st Cir. 1977), cert. denied, 436 U.S. 945 (1978). In 1978, the Puerto Rico legislature amended Public Law 87 to exempt job orders received through the ICS from the requirements of Public Law 87. This amendment satisfied the U.S. Department of Labor that Puerto Rican workers were "available," and the Department immediately joined with the Puerto Rican employment security agency to place Puerto Rican workers in mainland apple harvesting jobs. See generally U.S. General Accounting Office, Recruiting And Placing Puerto Rican Workers With Growers During The 1978 Apple Harvest Were Unsuccessful 8-11 (Feb. 14, 1980).

Growers engaged in a pattern of discrimination against migrant workers from Puerto Rico that frustrated and undermined the role of the Commonwealth in the Wagner-Peyser employment system and injured the well-being of its economy and its citizens.[10/] First, the Growers refused to hire Puerto Ricans who accepted job offers cleared through the ICS. Some of the Puerto Ricans with job offers were turned away at the orchards' gates; others with offers never left San Juan because they were informed by the United States Department of Labor and the Commonwealth Department of Labor and Human Resources that the Growers were refusing to hire Puerto Rican recruits. Second, the Growers fired Puerto Rican workers who had been recruited through the ICS system on a variety of pretexts, such as the lack of

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10/ See Joint Appendix 2-31.

work to be done and the inability of the Puerto Ricans to pick apples satisfactorily. Third, the Growers imposed working conditions on the Puerto Ricans that made their work more onerous and demeaning and less remunerative than the work alien workers were permitted to do.

These violations and the Growers' pattern of discrimination constitute assaults on the Commonwealth's attempts to secure for its citizens a measure of economic betterment through the employment system described above. It is to halt that erosion of the system as it applies to Puerto Rico and to protect its interests and the interests of its citizens in the future that the Commonwealth seeks declaratory and injunctive relief in this action.

SUMMARY OF ARGUMENT

The question before this Court is whether the Commonwealth has standing to sue for declaratory and injunctive relief for violations of federal laws that create a federal-State employment recruitment system and require defendant Growers to recruit domestic workers through the system. Because the violations and systematic discrimination alleged in the Complaint impair the Commonwealth's quasi-sovereign interests in the interstate employment system, as well as the economic and social interests of the Puerto Rican citizenry, the Commonwealth has standing to sue as parens patriae.

The doctrine of parens patriae allows a State to sue as a representative of its citizens if it has a quasi-sovereign interest in the subject matter of the suit or the injury alleged has a substantial

effect on the State's general population. This Court has repeatedly made clear that a State may sue parens patriae where, as here, the wrong complained of discriminated against and injured the State or its citizens because they resided in that State rather than somewhere else. In this case, the wrongs alleged injure the Commonwealth by frustrating and undermining its statutory role as a participant in the Wagner-Peyser interstate employment system, and they injure the economy of the Commonwealth and the well-being of its citizens by denying them the statutory employment preference to which they are entitled and by diminishing their opportunities for economic advancement. Because these injuries are widespread and reflect discrimination targeted at the Commonwealth and its citizens, the Commonwealth may properly bring this action parens patriae. Moreover, in view of the

serious obstacles facing individual suits and administrative proceedings seeking redress for the wrongs here alleged, and the insubstantial relief that could be achieved in such actions, the Commonwealth's standing not only is permissible, but is a compelling practical necessity.

ARGUMENT

I. THE COMMONWEALTH OF PUERTO RICO HAS STANDING TO SUE BECAUSE THE GROWERS' ALLEGED VIOLATIONS INJURE THE COMMONWEALTH'S STATUTORY AND ECONOMIC INTERESTS IN THE FEDERAL-STATE EMPLOYMENT RECRUITMENT SYSTEM, AS WELL AS THE ECONOMIC AND SOCIAL INTERESTS OF ITS CITIZENS.

This Court's prior decisions "establish the right of a State to sue as parens patriae to prevent or repair harm to its 'quasi-sovereign' interests."[11/] While

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11/ Hawaii v. Standard Oil Co., 405 U.S. 251, 258 (1972) (footnote omitted), citing Louisiana v. Texas, 176 U.S. 1 (1900); Missouri v. Illinois, 180 U.S. 208 (1901); Kansas v. Colorado, 206 U.S. 46 (1907);

[Footnote continued next page]

the cases do not set forth any precise formula, and standing decisions are generally "determined by the specific circumstances of individual situations" (Chapman v. Federal Power Commission, 345 U.S. 153, 156 (1953)), the Court's prior decisions make clear that a State has standing to sue parens patriae where, as here, it demonstrates a quasi-sovereign interest in the subject of the lawsuit and where, as here, it is seeking relief on behalf of its general population.

[Footnote continued from preceding page]

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); New York v. New Jersey, 256 U.S. 296 (1921); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); North Dakota v. Minnesota, 263 U.S. 365 (1923), all discussed infra.

For parens patriae purposes, the Commonwealth of Puerto Rico is equivalent to a State, see Puerto Rico v. SS Zoe Colocotroni, 456 F. Supp. 1327, 1337 (D.P.R. 1978), aff'd 602 F.2d 12 (1st Cir. 1979), cert. denied, 450 U.S. 912 (1981); Guam v. Federal Maritime Comm'n, 329 F.2d 251 (D.C. Cir. 1964); Puerto Rico v. Federal Maritime Comm'n, 288 F.2d 419 (D.C. Cir. 1961).

In case after case, this Court has held that a State may sue parens patriae where, as here, the wrong complained of discriminated against and injured the State or its citizens because they resided in that State rather than somewhere else. In Georgia v. Pennsylvania Railroad, 324 U.S. 439 (1945), for example, the Court recognized that the State of Georgia had a quasi-sovereign interest in discriminatory railroad rates that disadvantaged its shippers and that it could properly vindicate that interest by parens patriae litigation. In Georgia, as in other cases where States have sought to vindicate similar quasi-sovereign interests, the Court held parens patriae standing proper without regard to the number of State citizens affected by the alleged wrongdoings.[12/] The geographically

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12/ E.g., Missouri v. Illinois, 180 U.S. 208 (1901) (sewage discharge); Kansas v.

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targeted nature of the wrong created a qualitatively different injury "apart from [the interests] of particular individuals who may be affected."[13/] The Court found support for its decision in Pennsylvania v. West Virginia, 262 U.S. 553 (1923), where Pennsylvania sued as parens patriae to challenge West Virginia's natural gas regulations, which discriminated against out-of-state consumers. See 324 U.S. at 450-451.

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Colorado, 206 U.S. 46 (1907) (diverted stream); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (air pollution); New York v. New Jersey, 256 U.S. 296 (1921) (sewage); North Dakota v. Minnesota, 263 U.S. 365 (1923) (flooded farmlands).

13/ 324 U.S. at 451. The fact that some members of the State's population may also seek to redress their private injuries from a defendant's actions does not preclude the State's parens patriae standing; its quasi-sovereign interests are still "independent of and behind the titles of its citizens," Georgia v. Tennessee Copper Co., 206 U.S. at 237, and call for vindication by the State.

This Court's recent decision in Maryland v. Louisiana, 101 S. Ct. 2114, 2124 (1981), is to the same effect. There, Maryland and other States sued as parens patriae for injuries imposed on their citizens, because of their residency in those States, by Louisiana's tax on natural gas piped out of state. The Court held that a State "may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way." The State's parens patriae standing did not turn on any quantitative calculus about the individual injuries resulting from the alleged wrong. Instead, it was enough that the State sought to vindicate its "interest in protecting its citizens from substantial economic injury presented by imposition of the First-Use Tax," which discriminated between residents of

Louisiana and those of other states. 101 S. Ct. at 2125.[14/]

Under these standards it should be clear that the Court of Appeals correctly decided that Puerto Rico has parens patriae standing to bring this action. Puerto Rico has a quasi-sovereign interest, both in protecting its statutory role in the Wagner-Peyser Act employment program and in protecting its citizens from

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14/ See also North Dakota v. Minnesota, supra, 263 U.S. at 374 (the State had a quasi-sovereign interest in the "comfort, health and prosperity of its farm owners"); Washington Utilities & Transp. Comm'n v. Federal Communications Comm'n, 513 F.2d 1142, 1152 n.14 (9th Cir.), cert. denied, 423 U.S. 836 (1975) ("An independent state interest may be sufficient, whether or not a substantial portion of the citizenry is affected or an adequate individual remedy is available.").

injuries imposed on them as a class by reason of their Puerto Rican residency.[15/]

15/ Cases such as Pennsylvania v. New Jersey, 426 U.S. 660 (1976) (per curiam); Oklahoma v. Cook, 304 U.S. 387, 394 (1938); Kansas v. United States, 204 U.S. 331, 340-41 (1907), and New Hampshire v. Louisiana, 108 U.S. 76 (1883), where States were not allowed to proceed in the Supreme Court on behalf of their citizens, are not to the contrary. While the Court did refer to quantitative measures to deny standing in these cases, they were concerned, not with parens patriae standing itself, but rather with the very different issue whether States may invoke the Supreme Court's original jurisdiction to act as little more than collection agents for certain of their aggrieved citizens. The Court explained the rationale of these cases in Pennsylvania v. New Jersey:

> This rule [denying standing if the State is "merely litigating as a volunteer the personal claims of its citizens"] is a salutary one. For if, by the simple expedient of bringing an action in the name of a State, the Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated. And, more important, the critical distinction, articulated in Art. III, § 2, of the Constitution, between suits brought by "Citizens" and those brought by "States" would evaporate.

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A. The Commonwealth Has An Independent Statutory Interest In The Wagner-Peyser System That It Has Standing To Protect.

In enacting the Wagner-Peyser Act of 1933, Congress responded to a widely perceived need for a workable interstate employment system. The plight of Depression-plagued American workers was, of course, at the forefront of Congress' concern. But Congress recognized that the States, too, were in severe straits, unable by themselves adequately to provide for their workers. The obstacles encountered by the States in attempting to run employment offices without a well-coordinated interstate system were central concerns of Congress.[16/] The resulting

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426 U.S. at 665-66.

16/ See, e.g., 77 Cong. Rec. 4777 (1933) (remarks of Mr. Cochran); S. Rep. No. 63, 73d Cong., 1st Sess. 4 (1933).

legislation was intended to overcome these obstacles by creating a system to which the States contribute money and organization, and from which they gain the benefits of a coordinated interstate job exchange that they can mobilize in support of their economies.

The statutory scheme gives the States major responsibilities and requires them to perform significant governmental and sovereign functions. The Wagner-Peyser Act charges the Commonwealth with a duty to further an interstate employment system that matches domestic workers with employers and imposes on the Commonwealth obligations that are set out in complex implementing regulations.[17/] The Commonwealth is required, for example, to promote the full use of its placement

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17/ E.g., 20 C.F.R. §§ 602, 603 (1981).

facilities, to offer employment counseling to applicants, and to place workers in the jobs that are the most advantageous to them. It must structure its employment service so as to coordinate both with other State agencies and the Department of Labor with respect to placement generally and, more specifically, with respect to the recruitment and movement of migrant farmworkers. The Commonwealth's plans for carrying out its duties must be formalized in a document that the Department of Labor must review and approve.

The immigration laws and the temporary foreign labor certification regulations also reflect Congress' intention to use the interstate employment system to further the interests of the States.[18/] In 1965 Congress reviewed both

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18/ 8 U.S.C. § 1101(a)(15)(H)(ii) (1976).

the H-2 program and its "sister" INA section 212(a)(14)[19/] in response to concerns of States and their citizens about the adverse economic impact of foreign workers. It amended section 212(a)(14) to include an express presumption that alien workers may not be admitted unless there are no available domestic workers[20/] and satisfied itself that the H-2 program included the same presumption of non-admissibility.[21/] To assure that this

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19/ 8 U.S.C. § 1182(a)(14) (Supp. IV 1980).

20/ See Pub. L. No. 89-236, § 10(a), 79 Stat. 917 (1965).

21/ See 111 Cong. Rec. 20,997-98 (1965) (change in H-2 provision not necessary to raise presumption of nonadmissibility); S. Rep. No. 748, 89th Cong., 1st Sess. 26-27, reprinted in [1965] U.S. Code Cong. & Ad. News 3328, 3345 (existing law requires labor certification prior to determination on temporary worker's entry). The priority for U.S. workers reflects Congress' intent that aliens be imported for temporary labor only "for the purpose of alleviating labor shortages." H.R. Rep. No. 1365, 82d Cong., 2d Sess. 45, reprinted in [1952] U.S. Code Cong. & Ad. News 1653, 1698. See generally

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presumption will be given effect, the regulations require employers who desire to hire foreign workers to use the Wagner-Peyser system so that the State employment agencies will have the opportunity first to place their citizens in jobs.22/

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S. Rep. No. 748 at 10, 15, [1965] U.S. Code Cong. & Ad. News 3329, 3333-34 (report on Pub. L. 89-236, § 10(a)); 111 Cong. Rec. 23,351 (1965) (remarks of Mr. Kennedy); Hearings on H.R. 2580 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. 322-27 (1965).

22/ 20 C.F.R. §§ 655.200-.203 (1981). The Commonwealth's quasi-sovereign interest in this statutory program can be analogized to implied contracts embodied by the regulations that the Growers have allegedly violated. When aliens are hired by mainland growers through the H-2 programs, their foreign governments enter into contracts with the growers through their negotiating agent, the British West Indies Central Labour Organisation (BWICLO). In the case of domestic workers, the regulations governing the foreign labor certification and domestic recruitment process supplant express contracts. See Comm. Print, supra note 6, at 77. But the States can be said to enter into implied contracts that, by analogy to the express contracts of foreign governments, are tripartite, involving growers, workers, and

[Footnote continued next page]

This combination of statutory benefits and duties confers on the

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the workers' governments.

In the foreign worker context, the existence of independent and sovereign interests of the workers' governments in the H-2 program is clear. The Chief Liaison Officer of the BWICLO, for example, informed a Senate committee that "[t]he Governments of the countries in which the workers are recruited have their serious unemployment problems relieved by the temporary migration of the farm workers. . . . Undoubtedly all concerned benefit from the West Indies Programme for supplemental farm labour." Agricultural Labor Certification: Programs And Small Business: Hearings Before tbe Select Comm. on Small Business, 95th Cong., 1st Sess. 84 (1977).

In a different context, a federal district court recently dismissed the BWICLO and the Government of Jamaica as defendants in a suit alleging concerted discrimination against domestic migrant workers on the grounds that they were protected by sovereign immunity. Rios v. Marshall, No. 79-5711 (S.D.N.Y. Nov. 23, 1981). To reach this conclusion, the court found that the conduct of the BWICLO and Jamaica was sovereign or "governmental" in nature. Just as a government's activities regarding dispositions of its natural resources are sovereign acts, the court held, the BWICLO/Jamaican Government participation in the H-2 program was "the equivalent of establishing terms for the temporary removal of manpower resources from its territory." Id. at 22. Concern for and management of "manpower resources"

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Commonwealth an independent, quasi-sovereign interest in securing compliance with the Wagner-Peyser program and temporary foreign labor certification process by employers like the Growers.23/

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were not the type of acts that "'private persons normally perform.'" Id. at 21 (citing H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14, reprinted in [1976] U.S. Code Cong. & Ad. News 6604, 6613). By the same token, Puerto Rico has a quasi-sovereign interest in the laws and regulations at issue in this suit.

23/ As this Court said in Coleman v. Miller, 307 U.S. 433, 441-42 (1939):

> [T]here has been recognition of the legitimate interest of public officials and administrative commissions, federal and state, to resist the endeavor to prevent the enforcement of statutes in relation to which they have official duties.

See also Chapman v. Federal Power Comm'n, 345 U.S. 153 (1953) (standing upheld where violations were alleged to have adverse effect on performance of official duties); Washington Utilities & Transp. Comm'n v. Federal Communications Comm'n, 513 F.2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975) (State agencies had standing to challenge FCC order affecting State

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The Commonwealth is a governmental entity that administers the Wagner-Peyser program. No other party has the resources or motivation to vindicate the Commonwealth's interests in ensuring that the expenditures it makes each year to combat its unemployment problem through the Wagner-Peyser system, and to comply with the duties imposed upon it by federal law, are more than empty -- and costly -- gestures.

The fact that the Department of Labor also has statutory responsibilities under the Wagner-Peyser Act and H-2 program in no way diminishes Puerto Rico's

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agencies' discharge of duties imposed by law); Interstate Commerce Comm'n v. Oregon-Washington R.R. & Navigation Co., 288 U.S. 14, 24-25 (1933) (State agencies had standing to challenge a district court order concerning the construction of certain railroad routes, since the agencies "officially represent[ed] the interest of their states in obtaining adequate transportation service.").

interests or its capacity to bring this suit.[24/] The Commonwealth's interests and the U.S. Department of Labor's interests are consistent, but not identical, and the Commonwealth should not have to abdicate its quasi-sovereign powers and responsibilities in the interstate employment system.[25/] Courts "should not be niggardly in gauging the interest of a state administrative officer in the validity of what his federal counterpart has done in an area of overlapping fact and intertwined law" (Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967)), and they should be especially solicitous of State interests

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24/ See Interstate Commerce Comm'n v. Oregon-Washington R.R. & Navigation Co., supra.

25/ Because Puerto Rico is not complaining of any action by the federal government or its agencies, this suit does not violate the long-settled prohibition against State parens patriae suits against the federal government. See Massachusetts v. Mellon, 262 U.S. 447 (1923).

when there are no countervailing federal sovereign interests. The Secretary of Labor stated the point plainly in his brief, in the companion case to this one in the Second Circuit, supporting standing for Puerto Rico:

> [T]he Secretary of Labor's preeminent concern in the labor certification area must be the protection of the interests of those domestic workers, including Puerto Ricans . . . . Obviously, in that regard, the federal interest and that of the Commonwealth are entirely consistent . . . .
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> . . . [S]uit for injunctive relief to prohibit mistreatment of Puerto Rican workers would not interfere with the employment service complaint procedures, but instead would provide a forum for raising allegations of systemic practices which are not easily addressed through the complaint procedures.26/

26/ Brief for the Secretary of Labor as Amicus Curiae at 11, 12-13, Puerto Rico v. Bramkamp, 654 F.2d 212 (2d Cir. 1981).

B. The Commonwealth Also Has Parens Patriae Standing Because Of The Substantial Harm The Growers' Alleged Violations Do To The Economic And Social Interests Of Its Citizens.

No novel principle of law is required to support the proposition that some wrongs perpetrated against individuals are public, and not merely private wrongs, which the representative of the public may redress. Under this familiar principle, violence against an individual becomes a breach of the public peace; theft of property from an individual, an offense against public security.

In In re Debs, for example, the federal government was granted standing to enjoin the 1894 Pullman strike.27/ The government's cause of action in Debs was based on the Commerce Clause, but the

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27/ 158 U.S. 564 (1895).

principle of governmental standing to bring "public interest" suits is not limited to constitutional cases and extends to suits to redress statutory violations. In a recent case, Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979), this Court upheld a village's standing to sue realtors who allegedly "steered" customers toward and away from integrated areas in violation of the Fair Housing Act of 1968. "Steering," the Court observed, could deflate real estate prices in the village, and "[a] significant reduction in property values directly injures a municipality." 441 U.S. at 110-11. Moreover, the Court recognized that the village's interests in racial stability and balance might be harmed by the alleged statutory violations; if facts demonstrating such harm were established, "the Village has standing to challenge the legality of [defendants'] conduct." Id. at 111.

In Puerto Rico, where employment insecurity is a stubborn virus that will be shaken only by careful ministrations, flagrant breaches of the Wagner-Peyser employment security system and the concomitant erosion of the statutory preference for Puerto Ricans over foreign workers are more than private wrongs, for several reasons.

--First, the unemployment of Puerto Rican agricultural workers causes "ripple" effects throughout the Commonwealth's economy. Welfare expenditures and other costs of supporting the unemployed go up, limiting the Commonwealth's ability to attack other social problems or even to provide the basic underwriting necessary for schools and hospitals. At the same time, tax revenues decrease, as businesses that face flagging demand from a strapped population

flee the island. Increased job competition on the 100-by-36 mile island, as agricultural workers are forced to stay home, exacerbates social and political unrest.

--Second, while the migrant workers who directly suffered private injuries in the 1978 harvest comprise a relatively contained group, the class of Puerto Ricans who are vulnerable to continuing violations and disappearing opportunities on the mainland is far larger. Any one of the Commonwealth's nearly thirty percent unemployed looking for work could be affected.[28/] Puerto Rico seeks prospective relief for this broader class of its citizens, who may not have standing to sue on their own.

28/ Goolrick, Puerto Rico Is Hurt By Investment Slump And Reagan Cutbacks, Wall St. J., Feb. 3, 1982, at 1, col. 6.

--Third, when Puerto Rican citizens as a class are the objects of systematic discrimination in employment or any other endeavor, all Puerto Ricans, whatever their economic status, are harmed. Unremedied illegal resistance to Puerto Rican participation in agricultural work may encourage resistance to Puerto Rican participation in other segments of the mainland economy. Discrimination on the basis of Commonwealth citizenship may infect noneconomic spheres of life, creating barriers to full participation in the social and political culture of the United States.

Prior decisions of this Court support granting parens patriae standing where the effects of ostensibly private wrongs reverberate throughout a State in this way. In Maryland v. Louisiana, supra, for example, the Court held that States

could proceed as parens patriae to challenge Louisiana's First-Use Tax. The Court recognized that the tax was imposed on gas pipeline companies and not on citizens of the plaintiff States and that the economic burden of the tax on individual citizens of the plaintiff States was insubstantial. But it found the States' standing proper because the effects were widespread and because the challenged tax discriminated among persons on account of their residence in those States.29/ Similarly, in Georgia v. Pennsylvania Railroad, supra, and Pennsylvania v. West Virginia, supra, the Court allowed States to sue parens patriae to redress economic discrimination that directly or indirectly

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29/ 101 S. Ct. at 2125; see also North Dakota v. Minnesota, supra, and Missouri v. Illinois, 180 U.S. 208, 241 (1901), both cases in which the possible reverberating effects of wrongs directly injuring only a segment of the population were the bases for parens patriae suits.

affected various consumers and others because of their residency in the plaintiff States. In this case, too, the violations of federal law at issue affect Puerto Ricans directly and indirectly in a discriminatory fashion because they reside in Puerto Rico, rather than somewhere else. These violations are thus public wrongs that the Commonwealth is entitled to redress and to guard against: They "limit[] the opportunities of her people . . . and relegate[] her to an inferior economic position among her sister States."30/

II. PRACTICAL AND REMEDIAL CONSIDERATIONS WEIGH HEAVILY IN FAVOR OF PERMITTING THE COMMONWEALTH TO GO FORWARD WITH THIS SUIT.

The unavailability of effective remedies in individual actions challenging

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30/ Georgia v. Pennsylvania R.R., supra, 324 U.S. at 451.

the wrongs alleged in this case provides further support for the Commonwealth's parens patriae standing. In the first place, Puerto Rican workers face nearly insuperable obstacles in redressing through private actions the alleged violations by mainland growers. The costs of cumbersome interstate litigation and procedural problems presented by such litigation make it difficult if not impossible for even those Puerto Ricans who have been directly injured by the Growers to obtain any individual remedies.[31/] Second, even if private actions were more fruitful, and

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31/ In addition, to the extent that the Growers have frustrated the interstate job information exchange, individual unemployed Puerto Rican workers who are entitled to its benefits may be unable to show that they have personally been harmed by the violations in ways that would entitle them to private remedies. Such workers may have no actionable claim if, for example, they sought but were unable to formalize an employment offer or firm commitment with a mainland employer -- but they are harmed by the system's breakdown.

resulted in sanctions and remedies, the relief won would not vindicate the interests asserted by the Commonwealth of Puerto Rico in this suit.

A. Private Litigants Face Great Obstacles In Seeking Relief.

Petitioners point to lawsuits brought by individual Puerto Rican workers in the local courts of Puerto Rico as an indication that the Commonwealth's suit is superfluous and that the workers "have clearly demonstrated their ability to litigate the issues themselves." Brief for Petitioners at 27, 29-31. But the disjointed legal proceedings have brought and promise to bring no relief to the individual migrants or to the Commonwealth. Seventy-eight cases involving 220 workers were filed in Commonwealth courts as a result of the 1978 apple harvest in Virginia, New York, West Virginia, and

Maryland. In view of the fact that over 900 Puerto Ricans came to the mainland for the harvest, but less than thirty held jobs after two weeks, these cases do not encompass the complaints of hundreds more potential plaintiffs. Seventy-two of the cases have gone to judgment, twenty-two involving Virginia employers including defendant Growers. But the judgments have been ineffective: The Growers have contested the jurisdiction of the Puerto Rican courts in all cases and have consistently defaulted, resulting in judgments for damages averaging $700 to $1,000. While some actions to enforce the judgments have been brought in New York and Virginia courts, no final resolutions are in view.[32/]

32/ Similarly, the class action that was filed against most of the Growers more than three years ago in federal district court in Puerto Rico, see Brief for Petitioners at 30, limps along. The Growers filed a motion to dismiss on which the court has

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Numerous factors hinder the prosecution of individual claims in court or through administrative channels. Migrant farmworkers lack familiarity with the legal system. They cannot afford private counsel and thus must depend on community groups, yet many reside in rural areas where social services and support organizations are weak or nonexistent. The necessity of continuing to work on a daily basis in order to survive makes the diligent pursuit of legal claims impossible. And, if the worker manages to obtain a job with a mainland grower, his

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not yet ruled.

Administrative proceedings have also yielded no relief for Puerto Rican migrant workers, who have been unable to present proof establishing violations to the satisfaction of mainland State investigators. Only a few of the negative determinations have been appealed to the Department of Labor. See text, infra, for reasons underlying the lack of success.

environment -- housing, meals, and transportation -- is controlled by his employer, who is likely to have recruited and hired him only begrudgingly, required to do so by the H-2 program regulations. The worker is a powerless transient in a foreign community dominated economically and politically by the agricultural employers. His ability and motivation to institute legal claims against his employer for discriminatory treatment while he is still on the job site are greatly inhibited.[33/]

At the legal services level, too, many obstacles exist. In many areas, including the apple region in Virginia, there are no legal services programs for

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33/ Indeed, the Puerto Rican worker who contemplates bringing a claim against any employer is likely to fear the prospect of being refused employment in the future by other employers.

migrants to which Puerto Rican workers can turn. The Virginia Farmworkers Project, the only legal services group in the State with migrant worker expertise, has only one farmworker attorney, who is not a member of the Virginia bar. The Project is based on the Eastern Shore, however, 200 miles away from the work areas.[34/] Programs and lawyers are geographically based, and the legal services groups to which Puerto Ricans turn when they return home have difficulty prosecuting litigation on the mainland. Budgetary restrictions lead to high lawyer turnover, inadequate research

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34/ Similar conditions exist in Maryland and West Virginia. A private attorney in Charlottesville has agreed to file enforcement actions on the default judgments obtained against Virginia employers in the Puerto Rican courts. This attorney faces an especially burdensome obstacle, too: a procedural requirement that a separate suit be prepared for each worker involved in the twenty-odd Puerto Rico cases. Seventy separate filings were required.

facilities, and inexperienced attorneys overloaded with cases. Puerto Rican Migrant Legal Services, for example, serves the entire migrant population of Puerto Rico through six offices staffed by eight lawyers. Funded by the Legal Services Corporation, its budget is severely squeezed, and it will be cutting back to seven lawyers and five offices in a matter of days.

Considerations similar to these have been important factors underlying this Court's past decisions granting parens patriae standing. In Maryland v. Louisiana, supra, for example, this Court held that States could sue parens patriae to challenge an allegedly unlawful tax that indirectly affected their citizens. The Court reasoned in part that the "individual consumers cannot be expected to litigate the validity of the [tax] given that the

amounts paid by each consumer are likely to be relatively small." 101 S. Ct. at 2125. By the same token, Puerto Rico has standing to bring this action because its citizens cannot as a practical matter be expected to be able to protect their interests through private litigation.[35/]

B. The Remedies Available Through Individual Suits And Administrative Enforcement Could Not In Any Event Vindicate The Commonwealth's Interests.

Even if the Puerto Rican court judgments were enforced in mainland courts or if sanctions and remedies were meted out in other individual proceedings, the relief

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35/ See also Pennsylvania v. Parker, 659 F.2d 306, 315 (3d Cir. 1981) (parens patriae civil rights suit for injunctive relief proper because many victims of violations may be unable to show likelihood of future violations of their rights and because individual litigation "is not likely to be within the resources available to the typical victims of [the alleged] misconduct").

won would not vindicate the interests asserted in this proceeding. Private suits would yield only individualized, narrow relief against particular Growers. Injunctive relief would be framed narrowly, and the deterrent effects of compensatory damage awards are problematical.

Administrative proceedings, too, are insufficient. The Department of Labor has basically two sanctions at its disposal. It can deny an employer certification in the year following the season in which the employer does not comply with the terms of a temporary labor certification, 20 C.F.R. § 655.210 (1981), or it can deny the employer access to the employment recruitment system, 20 C.F.R. § 658.501(a) (1981). Neither sanction would bring relief to the Commonwealth or its citizens; indeed, the latter sanction would be contrary to the Commonwealth's

purpose, which is to create employment opportunities for its citizens.[36/]

In contrast, this suit by the Commonwealth could result in a remedy more responsive to its concerns. Declaratory relief would protect all potential workers, not only those injured in 1978. The injunction requested would be broader than an injunction that could be obtained by any

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36/ As the Secretary of Labor put it in his brief in the Second Circuit in the companion case to this one, "the complaint system does not contemplate injunctive relief . . . [and] regardless of the efficacy of the system in handling individual complaints, these procedures were not intended to redress Puerto Rico's allegations of systemic mistreatment of Puerto Rican workers." Brief for the Secretary of Labor, supra note 26, at 12.

Under 20 C.F.R. § 658.502(a)(5)(ii) (1981), back pay to workers may also be available. Even this seldom-used remedy would fail to protect the Commonwealth's interests in obtaining benefits and performing its duties under the interstate employment system and in halting wrongs perpetrated against Puerto Ricans on the basis of their citizenship.

individual worker against the Grower causing him injury. The symbolic effects of the Commonwealth's suit would also be considerable. Under the current regime, mainland employers can violate the laws, confident that only a rare worker will have the resources to pursue a complaint to a successful conclusion and that the remedy he can obtain will be trivial compared to the total costs resulting from all their violations. But if the Commonwealth can obtain relief -- even if it ultimately fails in this action, but its standing to sue is acknowledged -- the requirements of the law will be taken more seriously, and a measure of integrity may be restored to the interstate employment system and H-2 program.

This Court has made clear that the existence of alternative private and administrative remedies in no way precludes

parens patriae suits. In Georgia v. Pennsylvania Railroad, supra, the Court held that administrative and private remedies did not bar Georgia's parens patriae suit. In Pennsylvania v. West Virginia, supra, and Georgia v. Tennessee Copper Co., supra, too, the Court also sanctioned parens patriae suits even though individuals could have brought suit on their own. The Court recognized in these cases that the States have independent interests of their own that can be vindicated only by parens patriae litigation.37/

37/ See also Missouri v. Illinois, supra, 180 U.S. at 241:

> An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri. . . .
>
> [S]uits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate.

If the Commonwealth of Puerto Rico were not allowed to proceed, neither courts nor administrative agencies would have occasion to view the broader picture of systematic discriminatory violations and the undermining of the Commonwealth's statutory role in the interstate employment system that are at issue in this action. In that event, there would in all likelihood be no remedy adequate to deal with the wrongs alleged, and the pattern of violations so harmful to the Commonwealth and its citizens would be permitted to continue. Because the Commonwealth is the party best able to obtain the relief necessary to protect its interests, it was properly found to have parens patriae standing to bring this action.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals granting the Commonwealth standing to sue should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1981

ALFRED L. SNAPP & SON, INC., *et al.*,
Petitioners,

v.

COMMONWEALTH OF PUERTO RICO On the relation of PEDRO BAREZ, SECRETARY, DEPARTMENT OF LABOR AND HUMAN RESOURCES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE STATE OF NEW YORK, JOINED BY THE COMMONWEALTH OF PENNSYLVANIA, IN SUPPORT OF RESPONDENT

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No. 80-1305

IN THE

Supreme Court of the United States

October Term, 1981

ALFRED L. SNAPP & SON, INC., *et al.*,
Petitioners,

v.

COMMONWEALTH OF PUERTO RICO On the relation of PEDRO BAREZ, SECRETARY, DEPARTMENT OF LABOR AND HUMAN RESOURCES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE STATE OF NEW YORK, JOINED BY THE COMMONWEALTH OF PENNSYLVANIA, IN SUPPORT OF RESPONDENT

Interest of *Amicus*

The State of New York and the Commonwealth of Pennsylvania submit this brief *amicus curiae* because they have a vital interest both in preserving a sovereign state's standing to sue in its *parens patriae* capacity, and in preserving a state's ability to sue to prevent unlawful interference with its obligations under federal law.

For nearly a century, this Court has recognized states' authority, as *parens patriae*, to seek federal judicial remedies for injuries to the health and welfare of their citizens.[1] During that time, this Court has repeatedly acknowledged that states possess *parens patriae* authority as an inherent attribute of sovereignty,[2] and that the framers preserved this aspect of state sovereignty and created the federal court system "so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State." *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 450 (1945). *Cf. Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *The Federalist*, No. VII (Hamilton Nov. 17, 1787).

In this case, Puerto Rico's interests have been harmed by petitioners' actions. As the Fourth Circuit recognized, for purposes of standing analysis, this case is clearly in line with the many cases in which this Court has held that a state has standing to sue in its *parens patriae* capacity. Indeed, this case, involving a state's efforts to enjoin violations of federal law that deprive its citizens of employment opportunities, underscores the need for *parens patriae* standing. It is important to New York and Pennsylvania,

1. While Louisiana v. Texas, 176 U.S. 1, 19 (1900) is generally regarded as this Court's first case explicitly recognizing states' *parens patriae* standing, the doctrine was implicit in many earlier cases. *See, e.g., In Re Debs*, 158 U.S. 564, 584-587 (1895); Pennsylvania v. The Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 567 (1852); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 719-720 (1838).

2. Fontain v. Ravenel, 58 U.S. (17 How.) 369, 391-393 (1855) (Taney, Ch. J.); Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 257 (1972).

longstanding *parens patriae* litigants,[3] that this traditional avenue of protection for their citizens not be narrowed.

In addition, this case concerns a state's recourse to the federal courts to prevent direct interference with its responsibilities under federal law. In 1933, Congress responded to widespread unemployment, similar to that existing today, by enacting the Wagner-Peyser Act.[4] That Act created, *inter alia*, an interstate system of job services (the Federal-State Employment Service ["FSES"]), which gives workers who live in places with high unemployment access to jobs in states needing workers. New York and Pennsylvania, like Puerto Rico, have been longstanding participants in this system: accepting job orders from employers, recruiting unemployed individuals, and referring them to available jobs.

The unjustified refusals of petitioners—numerous Virginia apple growers—to employ workers from Puerto Rico seriously undermines the effectiveness of the Commonwealth's participation in the FSES system, and cannot be allowed to go unchallenged. Puerto Rico, New York, Pennsylvania, and any of the other participants in the FSES system must have recourse to the federal courts to protect their ability to participate effectively in that system.

3. *See, e.g.*, New York v. United States, 65 F. Supp. 856, 872 (N.D.N.Y. 1946) (three-judge court), *aff'd*, 331 U.S. 284 (1947); Carey v. Klutznick, 637 F.2d 834, 838 (2d Cir. 1980); New York v. 11 Cornwell Co., 508 F. Supp. 273, 276-277 (E.D.N.Y. 1981); Pennsylvania v. West Virginia, 262 U.S. 553, 591 (1923); Commonwealth of Pennsylvania v. Porter, 659 F.2d 306, 314 (3d Cir. 1981) (*en banc*), *pet. for cert. filed*, 50 U.S.L.W. 3175 (No. 81-465, Sept. 22, 1981).

4. 29 U.S.C. §§ 49-49k.

For these reasons, New York is filing this brief *amicus curiae,* joined by Pennsylvania, and is seeking leave to participate in oral argument,[5] urging affirmance of the Fourth Circuit's decision in this case.

Summary of Argument

The Commonwealth of Puerto Rico has alleged injury to at least two quasi-sovereign interests resulting from petitioners' actions, and is thereby entitled to sue in its *parens patriae* capacity. The Commonwealth's economy has been injured by petitioners' continuing unlawful refusal to employ migrant workers from Puerto Rico in conformity with the Wagner-Peyser Act and the federal regulatory scheme. In addition, petitioners' discrimination against workers from Puerto Rico has a deleterious effect upon the health and welfare of the entire Commonwealth community.

Moreover, Puerto Rico has standing to sue in its proprietary capacity to enjoin petitioners' conduct which prevents Puerto Rico from fulfilling its responsibilities under federal law as a member of the Federal-State Employment Service System.

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5. *See* Motion of *Amicus Curiae* State of New York to Participate in Oral Argument (January 28, 1982).

ARGUMENT

POINT I

Puerto Rico has standing to sue in its *parens patriae* capacity to enjoin conduct injuring its quasi-sovereign interests.

To have standing to sue as *parens patriae*, a state need only allege injury to a "quasi-sovereign" interest, *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251, 258 (1972) —an interest that arises from a state's responsibility, as sovereign, to protect the "health, comfort and welfare" of its citizens. *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 592 (1923).[6] Petitioners' alleged conduct has injured the health and welfare of Puerto Rico's citizens: its workers have been unlawfully denied much-needed employment; the Commonwealth's economy has been harmed; and discrimination has been practiced against the Puerto Rican community. Thus, as the Fourth Circuit held, Puerto Rico has alleged sufficient injury to its quasi-sovereign interests to give it standing to sue in its *parens patriae* capacity.

A. Petitioners' conduct has injured Puerto Rico's economy.

There can be little question that a State has a legally cognizable, "quasi-sovereign" interest in protecting its economy.[7] Numerous cases in this Court and lower federal

6. Puerto Rico is a sovereign entity entitled, like all states, to sue to protect its citizens' welfare. *See* Com. of Puerto Rico v. S.S. Zoe Colocotroni, 628 F.2d 652, 670 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

7. Though many early *parens patriae* cases involved injury to a state's environment, *see* Georgia v. Tennessee Copper Co., 206 U.S.

(footnote continued on next page)

courts have recognized states' rights to sue for economic injuries. *Maryland* v. *Louisiana,* 101 S.Ct. 2114, 2125 (1981); *Georgia* v. *Pennsylvania R. Co.,* 324 U.S. 439, 450 (1945); *Alabama* v. *TVA,* 467 F. Supp. 791, 794 (N.D. Ala. 1979), *aff'd,* 636 F.2d 1061 (5th Cir.), *cert. denied,* 50 U.S.L.W. 3246 (Oct. 5, 1981); *In re Multidistrict Air Pollution Litigation,* 481 F.2d 122, 131 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973). *See also Hawaii* v. *Standard Oil Co. of California,* 450 U.S. 251, 259-260 (1972); *Commonwealth of Pennsylvania* v. *Kleppe,* 533 F.2d 668, 675 (D.C. Cir.), *cert. denied,* 429 U.S. 485 (1976). This case is no different.

The Commonwealth recruited 2,318 unemployed individuals who were willing and able to fill petitioners' job orders. Petitioners, in direct violation of federal law, simply refused to hire the vast majority of these workers (Cmpl. ¶¶ 64, 66, 67, 72, JA at 17, 20-23, 27),* and hired foreign laborers instead. Most of those few workers from Puerto Rico who were hired were unlawfully discharged shortly thereafter (Cmpl. ¶¶ 64, 69, 76, JA at 17, 25, 28). The economic injury to the 2,318 potential workers from petitioners' actions is obvious. The deleterious effect on Puerto Rico's economy is equally so: the Commonwealth loses tax revenue, unemployment increases, and, as a result, the Commonwealth is forced to support the unem-

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230, 237 (1907), contrary to petitioners' suggestion (Brief for Petitioners ["Pet. Br."] at 17 n. 4), this Court has never restricted quasi-sovereign interests to "interstate nuisances." *See* Louisiana v. Texas, 176 U.S. at 19 (embargo on commerce from Louisiana to Texas); Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923) (limitation on natural gas exportable from Pennsylvania).

* Citations are to plaintiff's second amended complaint ("Cmpl."), located in the Joint Appendix ("JA") at pp. 2-31.

ployed and their families at substantial cost to all its citizens.

This injury, compounded by repeated resistance over several years to Puerto Rico's efforts to secure jobs for its migrant workers in the annual east coast apple harvest (Cmpl. ¶ 61, JA at 16-17),[8] is sufficient to support *parens patriae* standing. However, the adverse economic impact of the growers' action does not stop here; petitioners' conduct has a devastating ripple effect.

In 1978, unemployment in Puerto Rico reached epidemic proportions.[9] Facing an almost total absence of available job opportunities on the island, many of the Commonwealth's unemployed citizens became dependent on jobs on the mainland. Obtaining these jobs required extensive efforts, both by the Commonwealth, which amended its laws to ensure Puerto Rican workers' eligibility for mainland jobs (JA 32-36), and by the workers themselves, who had to travel thousands of miles to seek employment.

It is not difficult to foresee the negative impact on Puerto Rico if petitioners' illegal actions are not remedied. Few, if any, of its citizens will be encouraged to seek mainland employment if they face potential harassment, unequal working conditions, or total rejection. As a result, the

8. *See also* Jenkins v. S&A Chaissan & Sons, Inc., 449 F.Supp. 216, 219-220 n. 3 (S.D.N.Y. 1978).

9. *See* Com. of Puerto Rico v. Snapp, 632 F.2d 365, 370 (4th Cir. 1980).

Commonwealth's severe unemployment problem will become worse.[10]

Petitioners do not dispute that Puerto Rico has alleged injury to a quasi-sovereign interest. They argue, however, that *parens patriae* standing is inappropriate because their actions in 1978 directly harmed "only" 2,318 workers. Pet. Br. at 19-20. This argument is without merit. Injury to a state's quasi-sovereign interest, as correctly recognized by the Fourth Circuit, "has never been cast [as] a hard and fast game of numbers," 632 F.2d at 370. A state need not wait for unlawful activity to affect tens, or perhaps hundreds of thousands of workers before it is entitled to protect its quasi-sovereign interests.

By focusing only on those directly harmed by their conduct, the growers also ignore settled precedent that it is the effect of their actions on the general welfare that gives rise to *parens patriae* standing. *Maryland* v. *Louisiana*, 101 S.Ct at 2124 (". . . [a state] may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way"); *Missouri* v. *Illinois*, 180 U.S. 208, 241

10. Puerto Rico's annual average unemployment rate has been and continues to be nearly triple that of the United States:

	Puerto Rico	*Total United States*
1976:	19.5	7.7
1977:	19.9	7.0
1978:	18.1	6.0
1979:	17.0	5.8
1980:	17.1	7.1
1981:	19.9	7.6

U.S. Dept. of Labor, Bureau of Labor Statistics, *Employment and Earnings*, v. 29 n. 1 at p. 9 (Jan. 1982); Puerto Rico Dept. of Labor and Human Resources, Bureau of Labor Statistics, *Statistical Report* (1981).

(1901); *Louisiana* v. *Texas*, 176 U.S. at 19. The fact that some individuals experience greater harm from challenged conduct, and potentially reap greater benefits from a state's suit, is inherent in all *parens patriae* actions. *Com. of Pennsylvania* v. *Kleppe*, 533 F.2d at 674-675 ("And even where the most direct injury is to a fairly narrow class of persons, there is precedent for finding state standing on the basis of substantial generalized economic effects"); *Burch* v. *Goodyear Tire & Rubber Co.*, 554 F.2d 633, 634-635 (4th Cir. 1977).

Furthermore, even if the number of citizens directly injured were a critical factor, the alleged injury in this case to more than two thousand citizens—as well as a history of similar unlawful acts by these petitioners—is surely sufficient to justify the Commonwealth's *parens patriae* standing.

B. Petitioners' conduct has injured the health and welfare of Puerto Rico's population.

The Commonwealth has alleged that, in violation of federal law,[11] the growers unlawfully hired temporary foreign workers rather than available Puerto Rican workers, and subjected those few Puerto Rican workers who were hired to employment conditions more onerous than those faced by other temporary workers (Cmpl. ¶ 70, JA at 25-26). Either on account of the workers' race, or their na-

11. Wagner-Peyser Act, 29 U.S.C. §§ 49-49k; Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 *et seq.*; and their implementing regulations, 20 C.F.R. Part 655.

tional origin, it is alleged that petitioners unlawfully discriminated against workers from Puerto Rico.[12]

The harmful effect of petitioners' discriminatory employment practices reaches beyond the several thousand direct victims. It touches the entire Puerto Rican community. *See Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91, 110-111 (1979). It is particularly destructive here because the Commonwealth has been a participant in the employment process in which the discrimination occurred. If Puerto Rico remains indifferent to the growers' discriminatory treatment of its workers, it does so at the risk of appearing to condone that treatment. Legal action by the Commonwealth is part and parcel of its willingness and ability to press for equality under law.

Certainly preventing unlawful employment discrimination is part of a state's ability—indeed, its responsibility —to protect the health and welfare of its citizens; and several lower courts have agreed with this conclusion in the specific context of *parens patriae* standing. *Commonwealth of Pennsylvania* v. *Glickman,* 370 F.Supp. 724, 727-728 (W.D.Pa. 1974). *See also Commonwealth of Pennsylvania* v. *Porter,* 659 F.2d 306, 316-317 (3d Cir. 1981) (*en banc*),

12. 20 C.F.R. § 655.203 provides:

> As part of the temporary labor certification application, the employer shall include assurances, signed by the employer that:
>
> (c) The job opportunity is open to all qualified U.S. workers without regard to race, color, national origin, sex or religion, and is open to U.S. workers with handicaps who are qualified to perform the work. No U.S. worker will be rejected for employment for other than a lawful job related reason.

The term "U.S. worker" includes workers from Puerto Rico. 29 U.S.C. § 49b(b); 20 C.F.R. § 651.10.

pet. for cert. filed. 50 U.S.L.W. 3175 (No. 81-465, Sept. 22, 1981).

Parens patriae suits seeking redress of unlawful discrimination are not new to this Court. The trade barriers, antitrust violations and other impediments to the free flow of goods and services challenged in this Court's *parens patriae* cases were all attempts to discriminate against a plaintiff state's goods and services. Louisiana gave an unlawful preference to natural gas consumed by its citizens at the expense of gas shipped to other states in *Maryland* v. *Louisiana*, 101 S.Ct. at 2121-2122; Texas attempted to quarantine commerce emanating from Louisiana in *Louisiana* v. *Texas*, 176 U.S. at 19, 22; and the Pennsylvania Railroad sought to charge higher rates for goods shipped into and out of Georgia than for those shipped elsewhere in the nation in *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. at 443-444. *See also New York* v. *United States*, 65 F.Supp. at 872.

So too here, petitioners have erected a barrier between Puerto Rico and the mainland through which individuals —as opposed to goods—may not freely pass. If impediments to the free flow of a state's trade are sufficient, certainly unlawful impediments to the free travel of a state's workers in search of employment likewise entitle a state to sue as *parens patriae*. As stated by this Court over fifty years ago, and recognized as recently as last Term:

> If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. Discriminatory rates are but one form of trade barriers. They may cause a blight no less

> serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets. . . . Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate. If we denied Georgia as *parens patriae* the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction.

Georgia v. *Pennsylvania R. Co.*, 324 U.S. at 450-451.[13] *See Maryland* v. *Louisiana*, 101 S.Ct. at 2124-2125.

Parens patriae suits were permitted precisely to afford states a remedy for unlawful trade barriers. *See Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). The injury to Puerto Rico from barriers placed on the travel of its work force is at least as substantial a basis for according it standing as the economic bases found in these other cases.

13. Where, as here, the original jurisdiction of this Court is not invoked, there is even less reason to restrict *parens patriae* standing.

C. Puerto Rico has sued to vindicate interests of the Commonwealth, not as a volunteer for claims of individual citizens.

Petitioners assert that this lawsuit is merely an excuse for Puerto Rico to champion individual claims in federal court (Pet. Br. at 24-25). However, the fact that the complaint alleges a series of unlawful actions by numerous defendants against numerous individuals does not determine standing to sue. All *parens patriae* actions ultimately arise from conduct against certain persons or corporations. The determinative factor is not whether defendants' action affects every entity or citizen in an identical fashion, but rather whether the sum total of defendants' conduct causes a substantial injury to the state's health and welfare. *Maryland* v. *Louisiana*, 101 S.Ct. at 2124.

To distinguish legitimate *parens patriae* lawsuits from those seeking to vindicate individual interests, a crucial factor is whether injunctive or monetary relief is sought. *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. at 261. Where a state has sought damages, this Court has denied standing because a state may not act as a collection agency for the monetary claims of its individual citizens. *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 665 (1976); *New Hampshire* v. *Louisiana*, 108 U.S. 76, 91 (1883). By contrast, actions such as this one for declaratory and injunctive relief only, alleging harm to a state's quasi-sovereign interests, have been permitted. *See Hawaii* v. *Standard Oil Co. of California*, 405 U.S. at 258 (citing cases).

Petitioners' protestations to the contrary notwithstanding, potential or actual lawsuits by private individuals do not foreclose this *parens patriae* action. As Puerto Rico has not sought damages, there is no danger of subjecting petitioners to "duplicative recoveries," *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. at 264. And, should Puerto Rico succeed in enjoining the growers from violating federal law (JA 31), such an injunction would have no more or less effect on the growers' rights than "100 injunctions." *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. at 261.[14]

POINT II

Puerto Rico has standing to sue in its proprietary capacity to enjoin petitioners' interference with its responsibilities as a member of the Federal-State Employment Service system.

A state, like any entity, may sue for injuries to proprietary interests, *see Commonwealth of Pennsylvania* v. *Kleppe*, 533 F.2d 668, 671 (D.C. Cir.), *cert. denied*, 429 U.S. 485 (1976). Conduct such as petitioners' that impairs a state's ability to discharge its obligations under federal law "is the equivalent of 'personal stake,' 'injury in fact,' or 'concrete injury' that would support standing of

14. A state need not, as petitioners suggest, rely upon the possibility that an aggrieved individual might file an action including a claim for injunctive relief. Here there is no guarantee that any individual refused employment in the 1978 apple harvest would wish to work in subsequent harvests, and therefore be interested in filing such a suit. Moreover, an individual worker's interests could dictate settlement relinquishing injunctive claims, which, from the Commonwealth's point of view, could not be compromised.

a private plaintiff." *Washington Utilities Transportation Com'n* v. *F.C.C.*, 513 F.2d 1142, 1149, 1150-1151 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); *see Coleman* v. *Miller*, 307 U.S. 433, 442-445 (1939).[15] Here, Puerto Rico's responsibilities and duties as a participant in the FSES system are clear. *See Espinoza* v. *Stokely-Van Camp, Inc.*, 641 F.2d 535, 540 (7th Cir. 1981); *Gomez* v. *Florida State Employment Service*, 417 F.2d 569, 575 (5th Cir. 1969). Equally clear is its inability to meet these responsibilities if petitioners' conduct is not enjoined.

Pursuant to § 4 of the Wagner-Peyser Act, Puerto Rico has established an employment service to assist the United States Department of Labor in providing job-related services to its workers, 29 U.S.C. § 49c, and particularly to facilitate "interstate recruitment and movement" of migrant agricultural workers, 20 C.F.R. § 602.8 (1981).[16] To fulfill its duty to provide outreach to its migrant workers, the Commonwealth obtained job orders from the United States Department of Labor and recruited 2,318 individual workers to pick apples in the 1978 harvest (Cmpl. ¶¶ 61-65, JA 16-18). Puerto Rico was not, as petitioners would have this Court believe, an idle spectator to

15. *Cf.* Brewer v. Hoxie School District No. 46, 238 F.2d 91, 99 (8th Cir. 1956); Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967):

> This admixture of national and state policies, . . . yields the the corollary that a state official directly concerned in effectuating the state policy has an "interest" in a legal controversy . . . which concerns the nature and protection of the state policy.

16. *Cf.* 29 U.S.C. § 49b(a): ". . . the [United States Employment Service] shall also assist in coordinating the public employment offices throughout the country and in . . . *maintaining a system for clearing labor between the several States.*" (emphasis supplied)

a free-market bargaining process between the growers and potential employees;[17] rather, as provided by the regulations, it functioned as an employment agency.[18]

There can be little doubt that petitioners' unlawful refusals to hire Puerto Rico's migrant workers prevented the Commonwealth from fulfilling its role in this federal-state cooperative scheme.[19] In these circumstances, the Commonwealth is entitled to sue to enjoin interference with its obligations under the FSES system and with the protections afforded migrant workers.[20]

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17. The Commonwealth is particularly involved in this process in that, based upon advice of the United States Department of Labor, it instructed all workers who had not already left Puerto Rico not to travel to Virginia (Cmpl. ¶ 66, JA 22).

18. *See* 20 C.F.R. §§ 653.100-653.103, 653.107, and especially § 653.107(j).

19. *See* Gomez v. Florida State Employment System, 417 F.2d at 571-572:

> The Act's basic objective was to establish an interstate system for the recruiting and transfer of labor. The Act, quite obviously, was also intended to offer some protection to those employees who shift about the country . . .
>
> These objectives were to be accomplished through that well-known device of "cooperative federalism", and grant-in-aid system.

See also Sen. Com. on Education & Labor, "Report on National Employment Service," *Sen. Rep. No. 63*, 73d Cong., 1st Sess. (May 1, 1933).

20. *Cf.* Commonwealth of Pennsylvania v. Porter, 659 F.2d at 315.

Conclusion

For all of the reasons stated above, the Fourth Circuit's decision should be affirmed.

February 11, 1982

Respectfully submitted,

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